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No. 04-

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR CASTILLA and MANUEL A. CALAS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DONALD F. SAMUEL
Garland, Samuel & Loeb, P.C.
3151 Maple Drive, N.E.
Atlanta, GA 30305
(404) 262-2225

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Attorneys for Petitioners

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QUESTIONS PRESENTED

Petitioners' motions under 28 U.S.C. § 2255 alleged that each of them was denied his Sixth Amendment right to counsel, due to a conflict of interest arising out of their joint representation at trial.

1. Could a reasonable jurist find debatable the assertion -- in conflict with this Court's cases and the law in other circuits -- that such motions can be denied without a hearing on the basis that the petitioner has "failed to plead and to establish by citation to 'specific instances in the record' the manner by which [he] was prejudiced"?

2. Could a reasonable jurist find debatable the assertion -- in conflict with this Court's cases and the law in other circuits -- that such motions can be denied without a hearing on the alternative basis of waiver of the right, when the record fails to show that either petitioner understood the dangers and disadvantages of joint representation, particularly where no independent counsel was provided at the waiver hearing?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioners Castilla and Calas, and respondent United States). One of the petitioners' co-defendants, Fred De La Mata, also filed a § 2255 motion, which raised different issues and has been litigated separately. To petitioners' knowledge,their other co-defendant, Enrique Fernandez, has no pending case in court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Oscar Castilla and Manuel A. Calas respectfully petition this Court for a writ of certiorari to review the orders of the United States Court of Appeals for the Eleventh Circuit denying them certificates of appealability, which prevented each of them from pursuing the denial of his motion to vacate sentence under 28 U.S.C. § 2255.

OPINIONS BELOW

The Eleventh Circuit did not issue any opinion in the § 2255 proceedings. Judge Pryor denied each petitioner a certificate of appealability on June 15, 2004. Appendix A1-2. The United States District Court for the Southern District of Florida (Middlebrooks, J.) wrote no opinion, but rather entered orders dated February 10, 2004 (filed and entered on the docket February 11, 2004), adopting a U.S. Magistrate Judge's Report and Recommendation, which is not published. Copies of the district court's orders are Appendix B; the Report and Recommendation is Exhibit C. By Orders dated April 14, 2004, Judge Middlebrooks denied Applications for a COA addressed to the district court. Exh. D. He also failed to explain that denial other than by conclusory quotation of the statutory language. The Eleventh Circuit's opinions on direct appeal are Exhibits E and F.

JURISDICTION

The one-judge orders of the United States Court of Appeals for the Eleventh Circuit, refusing issuance of a Certificate of Appealability in relation to each petitioner's motion to vacate sentence under 28 U.S.C. § 2255, are dated June 15, 2004. App. A. The two-judge orders denying reconsideration in each case are dated July 21, 2004. Appx. G. By Order dated October 15, 2004, under No. 04A201, Justice Kennedy extended until November 1, 2004, the time for both petitioners to file a petition for a writ of certiorari. This petition is being filed by postmark on or before that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE INVOLVED

The first and second unnumbered paragraphs of section 2255 of title 28, U.S. Code, provide, in pertinent part:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence ... is ... subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect

> thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or [is] otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> * * * *

28 U.S.C. § 2255.

STATEMENT OF THE CASE

This petition presents important and recurring questions concerning the showing required for a federal prisoner to demonstrate that he was denied the benefit of his Sixth Amendment right to counsel by joint representation at trial with a co-defendant.

a. ***Procedural History***

Petitioners Oscar Castilla and Manuel A. Calas had been co-defendants at trial. They each filed a motion to vacate conviction and sentence pursuant to 28 U.S.C. § 2255 in April 2003. Each motion advances a single constitutional claim: that the respective petitioner did not enjoy the assistance of counsel as guaranteed by the Sixth Amendment at his 1992 trial in the Southern District of Florida before U.S. District Judge K. Michael Moore, and later on direct appeal to the Eleventh

Circuit. The two petitioners were jointly represented at trial by a single lawyer, who then also handled Mr. Castilla's appeal.

The petitioners are former Miami bank officers who were convicted of federal offenses related to bank fraud and money laundering. During trial, Calas and Castilla presented a joint defense that all the defendants lacked the requisite criminal intent, since the transactions in question were undertaken in the bank's economic self-interest and did not result in financial harm. Further, defense counsel argued that the defendants, acting together as a group, presumed that the bank was aware of their conflict of interests and that they were not required to formally disclose their participation. The jury rejected these arguments, and on December 30, 1992, Calas and Castilla were convicted for bank fraud, money laundering and racketeering.

A lengthy series of post-trial proceedings followed their convictions. Still represented by the same lawyer as his co-defendant, petitioner Castilla received a sentence of 97 months' imprisonment (comprising and subsuming numerous concurrent terms), that is, more than eight years, due in part to a finding that he played a "minor role." Petitioner Calas was sentenced to serve 109 months (more than nine years). After their direct appeal had been initiated, Judge William C. O'Kelley (N.D.Ga.) sat specially in the district court to hear a motion for new trial. The direct appeal was dismissed to allow the new trial motions to go forward.

Judge O'Kelley granted the petitioners and a number of other defendants new trials because of prejudice due to a federal investigation of Judge Moore which

was pending during their trial. On the government's appeal, however, the Eleventh Circuit reversed. See United States v. Cerceda, 172 F.3d 806 (11th Cir. 1999) (en banc), cert. denied, 528 U.S. 925 (1999). Appx. E. The district court in early 2000 consequently reinstated the judgments of sentence, and the petitioners initiated their own direct appeals. After briefing and argument, the Eleventh Circuit affirmed the convictions and sentence in most respects. See United States v. De la Mata, 266 F.3d 1275 (11th Cir. 2001), rehearing denied, 29 Fed. Appx. 576 (Nov. 26, 2001), cert. denied, 535 U.S. 989 (April 15, 2002) (No. 01-1248). Exh. F. Petitioner Calas had a new lawyer for both appeals; Castilla continued to be represented by their joint trial lawyer. The two petitioners' timely motions under § 2255 followed a year later. In the prayer for relief, each petitioner requested an evidentiary hearing.

On December 2, 2003, a United States Magistrate Judge filed a consolidated Report and Recommendation, in relation to the petitioners' motions to vacate. Exh. C. The report recommended that the § 2255 motions be dismissed without a hearing. The Magistrate Judge reported that each petitioner waived his right to conflict-free representation at a pretrial hearing held on June 19, 1992, before a different U.S. Magistrate Judge. The report further suggested that the petitioners' legal claims were insufficient on their face, were belied by the record, and should be denied alternatively on the merits.

Timely objections filed by each of the petitioners were overruled, and the district court (Middlebrooks, J.) adopted the report and recommendation by Orders dated February 10, 2004 (filed and entered the next

day). Exh. D. The district court denied certificates of appealability. Exh. B.

The Orders of Judge Pryor dated June 15, 2004, denied each petitioner a Certificate of Appealability pursuant to 28 U.S.C. §§ 2253(c)(1)(B), 2255(¶4), 11th Circuit Rules 22-1(d) and 22-2, and Fed.R.App.P. 22(b)(1). App. A. Without certificates, the petitioners' appeals could not proceed. Judge Pryor gave no reason for denying the applications, other than to quote the applicable statutory standard. On motion for reconsideration, a two-judge panel (Birch & Hull, JJ.) likewise denied issuance of a COA. App. G.

b. ***Statement of Facts***

Between 1983 and 1988, petitioner Calas was the executive vice president and petitioner Castilla was a senior vice president of the Republic National Bank of Miami ("RNB"). According to the evidence at trial viewed in the light most favorable to the verdicts, they conspired with RNB's president (De la Mata) to manipulate RNB's acquisition and development of four sites for new bank branches, to induce RNB to sell to the petitioners' nominees parcels of foreclosed real estate at prices below fair market value, and to extend bank loans to companies in which Calas and De la Mata held concealed ownership interests.

Petitioners Castilla and Calas were jointly represented at and before trial. The same lawyer who represented the petitioners jointly at trial and sentencing, then also handled petitioner Castilla's direct appeal. Before trial, the district court assigned a U.S. Magistrate Judge to conduct a hearing under Fed.R. Crim.P. 44(c) to inquire into the potential conflict of

interest. At this proceeding, held June 19, 1992, the Magistrate Judge addressed both Calas and Castilla about their right to conflict-free counsel. However, the dangers of joint representation were not comprehensively reviewed, and the waivers which were taken at that hearing were neither explicit nor clear.

For example, the Report and Recommendation on the § 2255 motions claims that petitioners at the 1992 hearing waived "all rights to raise the matter on appeal or through collateral attack." R&R 4; accord, R&R 9, citing Tr. 6/19/92, at 32, 44. In fact, the transcript contains nothing of the sort. See also Tr. 35-36 (reading of warning contained on written waiver form).[1] What petitioner Castilla did say in that regard was this:

> THE COURT [Turnoff, U.S.M.J.]: ... Let me ask you this: Do you understand that if I allow Mr. Pasano to remain in the case to represent you and your co-defendant, and in the event that you are convicted, and I don't know anything about this case, but I'm just giving you that as a possibility, in the event that you were convicted, that you will not be able to come back to the Court and say, "there was a conflict. Mr. Pasano should not have represented me, and therefore, I want a new trial." Do you understand that?
>
> THE WITNESS [Castilla]: I do. I understand, and I said already that I will waive any right you want.

[1] If there had been such a written waiver, it would have been invalid, as no attorney can advise a client to waive that attorney's own ineffective assistance or conflict.

Tr. 43. The judge did not ascertain whether Castilla understood what the judge meant by "come back to Court," and did not respond to petitioner that the court did not "want" him to waive any of his rights.

The hearing commenced with remarks by the Magistrate Judge praising the conflicted lawyer's ethics, Tr. 14, and promising that the lawyer would be "the first to withdraw" if he perceived any conflict. Tr. 15. This occurred before any evidence was heard.

The two petitioners were jointly represented at the hearing on joint representation. The court did not appoint an independent lawyer, such as a federal defender or CJA counsel, to advise either of them in confidence about the risks and disadvantages of joint representation. Instead, Judge Turnoff allowed each petitioner, after consultation with his shared counsel, to decide for himself (that is, without independent counsel) that he did not "need" independent advice. Tr. 38. The judge also supported the challenged lawyer's effort to cut off petitioner Calas's desire to say more, by telling him that "When he [counsel] puts his hand on your shoulder, that is generally a sign that you should be quiet." Tr. 25.[2] Moreover, as the prosecutor attempted to probe the defendants' statements, the attorney whose representation was at issue was permitted to object and

[2] This also suggests that the attorney was standing immediately by the client's side in the well of the courtroom during the colloquy; the petitioner was not seated in the witness stand. However, petitioner Calas also assured the Magistrate Judge that he knew he could speak with the court without the attorney present, and had "also waived" that right, he said. Tr. 34.

block further questioning into the petitioners' understandings. Tr. 22-23, 25-27 (Calas), 40 (Castilla). As a result, the question of conflict as to possible defenses was not explored, nor were specific examples given of how and why conflicts might arise.

The record contains substantial evidence that petitioners did not understand the nature of the rights that they were "waiving" or the disadvantages of that course of conduct. Petitioner Castilla testified before Magistrate Judge Turnoff that:

> I don't think it would be any conflict of interest because, number one -- excuse me, your Honor, I know that I am not an attorney -- but the two of us are innocent, decent, honest people, and even though the Government says whatever they want to, I will cooperate with the Government and never refuse to, but I never will say nothing [sic] but the truth, so I don't think that will create any conflict of interest between Carlos [sic, perhaps a mis-transcription of "Calas"] and me.

Tr. 38-39. Similarly, in response to a question from the Magistrate Judge about the possibility of being offered the opportunity to testify against his co-defendant, Calas stated, "As long as we are talking about the truth, we are willing to say the truth all the time, so I don't think that will be an issue." Tr. 17-18.[3] The record also shows

[3] Asked whether he understood that a lawyer with only one client in the case would find it easier to make a "deal" with the government, Calas responded, "I do not agree with that. I think that by doing negotiations with one of us, as long as the

that petitioner Castilla did not understand -- and therefore presumably had not been advised -- of what it means for a defendant to "cooperate" in a federal criminal case. Tr. 41-43.[4]

Judge Turnoff did not respond to either petitioner that reliance on the truth does not obviate the likelihood of a legal conflict between the interests of two co-defendants with knowledge of each others' activities, particularly where (according to defense and prosecution alike) the defendants could be viewed as having rather unequal culpability.

c. ***Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)*** The United States District Court had subject matter jurisdiction under 18 U.S.C. § 3231 and

_____(cont'd)

truth comes out, I don't think it will do any harm to any other one. I'm talking about me or Castilla, either way. We are seeking the truth. That is it." Tr. 18.

[4] This part of the transcript states:

> Q: Mr. Castilla, in the event that the United States were to come to you, individually, and ask if you would be interested in cooperating with the government, do you feel that you would be prevented from discussing that ... because [the same attorney] represents not only yourself, but [also] Mr. Calas? ...
>
> A: No. I have always thought that if the Government at any time calls me and wants my cooperation in anything, they will have it. You will have it, because number one, I have nothing to hide. Number two, because I am just going to say the truth, ... and that's what I believe, and that why I am standing here ....

Id.

jurisdiction over the motion to vacate under 28 U.S.C. § 2255. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253 to consider whether to issue a certificate of appealability. Hohn v. United States, 524 U.S. 236 (1998).

REASON FOR GRANTING THE WRIT

Introductory: A certificate of appealability should have been granted in these cases, because petitioners Calas and Castilla "ha[d] made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioners' § 2255 motions articulated a substantial issue under the Sixth Amendment right to counsel. Their joint representation at trial and at sentencing resulted in a conflict of interest with adverse effect on each of them. The correctness of the district court's rulings on two points -- the merits (based on the existing record) both with respect to adverse effect and with respect to waiver, and particularly whether a hearing should have been allowed -- are at least "debatable" among "jurists of reason." See Tennard v. Dretke, 542 U.S. --, 124 S.Ct. 2562, 2572 (U.S., June 24, 2004); Miller-El v. Cockrell, 537 U.S. 322, 335-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000), quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (standard for COA[5]). Because the denial of a COA in these cases cannot be reconciled with this Court's teachings on the standards for judging a conflict of

[5] This Court adopted the governing test from Judge Harold L. Murphy's influential decision in Gordon v. Willis, 516 F.Supp. 911, 913 (N.D.Ga. 1980).

interest by defense counsel, or with this Court's precedent concerning summary dismissal of motions under § 2255, the petitioners seek this Court's review.

The courts below refused a certificate of appealability on the basis of a plainly inapplicable rule, at odds with this Court's cases and the law in other Circuits.

This Court should grant certiorari and reverse the decision of the court below, because it is completely incompatible with the most basic principles of when a hearing must be allowed on post-conviction review of federal criminal convictions.

A reasonable jurist could readily disagree with the conclusion of the Magistrate Judge in these cases -- adopted by the district judge, App. B -- that petitioners "failed to establish that an actual conflict of interest tainted their counsel's efforts," App. C9, without affording each or both of them an evidentiary hearing, at which they would have an opportunity to establish the facts requiring § 2255 relief, including an adverse effect on counsel's performance. See Mickens v. Taylor, 535 U.S. 162 (2002). In the case of patent, concurrent representation, as here, this Court recognizes is a "high probability of prejudice," despite "the difficulty of proving that prejudice." Id. 175. Accordingly, an "adverse effect" in this setting is not to be equated with prejudice in the sense of proving "a probable effect on the outcome of trial." Id. 174.

Instead, in such cases, which is to say in these cases, what petitioners had to show -- at the evidentiary hearing they were denied -- was only that their shared

counsel had strategic choices to make among potential lines of defense, and that the choices he actually made among those alternatives for Calas, for Castilla, or both, were actually affected by the fact that he was undertaking a joint representation in which he had to look out for the interests of the other client as well. See Cuyler v. Sullivan, 446 U.S. 335 (1980). The petitioners offered to carry their burden of proof, but were denied the opportunity. Instead, their § 2255 motions were denied on the improper basis that they had to make the required showing without the benefit of the hearing that would be necessary to meet their burden.

Castilla's § 2255 motion, for example, specifically alleged every element of a Sixth Amendment violation due to joint and conflicting representation:

> (1) Applicant Oscar Castilla was represented before trial, at trial, and at sentencing by the same attorney who represented his co-defendant, Manuel Calas, despite the clear conflict of interest. Mr. Castilla did not knowingly or intelligently waive the conflict. The joint representation adversely affected the defense of Mr. Castilla both before and at trial, and at sentencing.
>
> * * * *
>
> (2) On appeal, represented by the same attorney (with new counsel representing co-defendant Calas), no separate statement was drafted to point out in relation to the issues adopted under Fed.R.App.P. 28(i) the greater risk that trial errors prejudiced Mr. Castilla, due to the paucity of evidence. Nor was any

issue raised on appeal about the inadequacy of the procedures followed by the district court to ensure that the two defendants' joint representation would not deny Mr. Castilla the effective assistance of counsel. The latter issue would have been stronger, and more likely to result in a reversal, than some of the other issues raised. (In any event, the brief was only 2/3 the maximum allowable length, permitting more issues to be raised if appropriate and not requiring any issue to be cut solely for lack of space).

These averments were then spelled out in even more detail:

> (a) In particular, the conflict affected counsel's advice and Mr. Castilla's decision whether to plead guilty or to elect a trial, and whether to testify in his own behalf. It further affected counsel's decisions concerning: whether to pursue a severance, the content and focus of cross-examination, what witnesses to call for the defense, and the focus and theme of closing argument.
>
> (b) Also adversely affected were sentencing strategy decisions concerning relative culpability.

In compliance with § 2255 itself as well as R.Gov. §2255 Proc. 2(b), the motion was verified by the petitioner under penalty of perjury. Thus, these were not merely formal averments but actually supported by the legal equivalent of an affidavit. The district court erred in adopting the recommendation of the Magistrate Judge

that a § 2255 motion alleging a conflict of interest due to joint representation be denied without a hearing, on the basis that the petitioner has "failed to plead and to establish by citation to 'specific instances in the record' the manner by which [he] was prejudiced." App. B1-4, adopting (over objection) App. C11.

The quoted standard was developed by the Fifth Circuit (and later adopted by the Eleventh) for employment on direct appeal, see United States v. Fox, 613 F.2d 99, 102 (5th Cir. 1980) (Frank M. Johnson, J.),[6] where it serves usefully to distinguish those complaints of ineffective assistance due to joint representation which are ripe for adjudiation on direct appeal from whose which are not.[7] As this Court has had recent occasion to note, the record developed at trial is often unsuitable for the decision of an ineffective assistance claim, including that claim's prejudice prong. See Massaro v. United States, 538 U.S. 500 (2003). On motion under 28 U.S.C. § 2255, however, the duty to demonstrate specific instances in the record where a conflict of interest may have become real rather than hypothetical cannot be imposed on a defendant until and unless he or she has been afforded the opportunity for an evidentiary hearing. A recent decision in the Sixth

[6] See United States v. Mers, 701 F.2d 1321, 1328 (11th Cir. 1983) (Vance, J.); United States v. Carter, 721 F.2d 1514, 1536 (11th Cir. 1984) (Johnson, J.).

[7] Other Circuits have utilized the Fox test for this purpose on direct appeal. See, e.g., United States v. Lowry, 971 F.2d 55, 64 n.8 (7th Cir. 1992); United States v. Cirrincione, 780 F.2d 620, 239 (7th Cir. 1985); United States v. Burney, 756 F.2d 787, 792 (10th Cir. 1985).

Circuit illustrates this well. See Moss v. United States, 323 F.3d 445, 463 (6th Cir. 2003) (applying Fox test to appeal of § 2255 denial after hearing).

The notion that a § 2255 which alleges a documented case of joint representation, for which no adequate waivers were obtained, could be dismissed without a hearing is not only one with which reasonable jurists could disagree, it is fundamentally repugnant to the plain language of § 2255 with respect to hearings as well as every decision of this Court construing it. See Blackledge v. Allison, 431 U.S. 63 (1977), and Fontaine v. United States, 411 U.S. 213 (1973) (per curiam) (quoting § 2255 itself: hearing required unless "files and records of the case conclusively show the prisoner is entitled to no relief"). The allegations of the verified motions were not "vague, conclusory, or palpably incredible." Machibroda v. United States, 368 U.S. 487, 495 (1962). In the absence of a record showing a conclusively valid waiver (as discussed post), a jurist of reason could therefore dispute the conclusion of the courts below that the motions could be dismissed without a hearing.[8]

As noted, if the record conclusively showed that the petitioners had waived their constitutional right to

[8] Magistrate Judge Johnson's observation that "neither the jury, district judge, probation office nor Court of Appeals accepted the argument that Castilla played a significantly lesser role in the conspiracy than did his co-conspirators," App. C12, while not an entirely accurate assessment of the existing record, may simply reflect the effect on him of the joint representation. It cannot eliminate the need for a hearing.

independent counsel, then the need for a hearing on the issue of adverse effect would be obviated. The Magistrate Judge's report, which the district court adopted, ruled that the applicants waived any claim of ineffective assistance due to a conflict of interest arising from this joint representation, at a pretrial hearing held before a U.S. Magistrate Judge in June 1992. But a reasonable jurist could readily conclude that the Magistrate Judge, as endorsed by the district court, erred in treating the record with respect to waiver of the right to independent counsel as "irrefutable." App. C7, App. B1-4.

As this Court discussed at length in Wheat v. United States, 486 U.S. 153, 161-64 (1988), the trial court has broad latitude to reject a proffered waiver of the Sixth Amendment right to separate counsel. True, each defendant's right to counsel of choice is highly valued, and is entitled to presumptive respect. But first the waiver must be knowing and intelligent, and even then it need not be accepted. The defendants must not be put in the position where it appears that by adhering to the proposed joint representation and proffering a waiver they are "acceding to the wishes of the court." Glasser v. United States, 315 U.S. 60, 71 (1942). Yet as set forth in some detail under the statement of facts above, that is what occurred at the hearing before trial in this case.

The Magistrate Judge praised the ethics and judgment of attorney proposing the joint representation, and expressly advised Calas to abide by that attorney's suggestions that he limit his answers about his understanding of the conflict. The judge also sustained the attorney's objections to the scope of questioning of the

petitioners on the subject. No independent counsel was appointed to step in to advise either petitioner whether the waiver was in his best interests. And no effort was made to correct, clarify or disabuse the petitioners' apparent misapprehensions of the nature and extent of the risk they were creating by pressing for joint representation. See pp. 7-10 ante.

A reasonable jurist could therefore disagree with the factual summary in the Magistrate Judge's Report, adopted by the district court, of what was covered at that hearing. See Appx. C3-4, 7-8. The lower courts' selective reading of this record cannot be squared with this Court's longstanding disfavor of summary dismissals of § 2255 motions without a hearing. Machibroda v. United States, 368 U.S. 487, 495 (1962). Nor is it the result that would obtain in other circuits. See, e.g., United States v. Rodriguez-Rodriguez, 929 F.2d 747 (1st Cir. 1991) (per curiam; Breyer, Ch.J., on panel) Armienti v. United States, 234 F.3d 820 (7th Cir. 2000); United States v. Christakis, 238 F.3d 1164, 1193-95 (9th Cir. 2001) (all holding a hearing required where facts necessary to establish § 2255 petitioner's entitlement to relief on conflict of interest grounds, as alleged, are not conclusively refuted by the existing record).

Finally, a jurist of reason could also dispute the Magistrate Judge's strange suggestion, again not disavowed by the district court, that if both Mr. Castilla and Mr. Calas allege in their respective motions to vacate that they were prejudiced by the conflict that they must both be wrong. App. C10. As a matter of fact, logic and experience, they might both be right, they might both be wrong, or one might be right and the other wrong.

Each was entitled to an individualized determination of his motion, made after an evidentiary hearing.

The decision of the court below that petitioner was barred from showing ineffective assistance of counsel through a § 2255 motion, by virtue of the ruling in his case on direct appeal, cannot be squared with basic principles of appellate and post-conviction law. The lower courts' analysis misconceives the scope of direct appellate review, as compared with a post-conviction petition, warranting this Court's intervention and consideration. The petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioners OSCAR CASTILLA and MANUEL A. CALAS pray that this Court grant their petition for a writ of certiorari, and remand the case to the United States Court of Appeals for the Eleventh Circuit with directions to grant certificates of appealability and reverse the denial of their motions under 28 U.S.C. § 2255 to vacate sentence.

Respectfully submitted,

DONALD F. SAMUEL
Garland, Samuel & Loeb, P.C.
3151 Maple Dr., N.E.
Atlanta, GA 30305
(404) 262-2225
Counsel for Calas

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200
Counsel for Castilla

November 1, 2004.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
JUN 15, 2004
THOMAS K. KAHN
CLERK

No. 04-11756-E

OSCAR CASTILLA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ William H. Pryor
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11758-E

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
JUN 15, 2004
THOMAS K. KAHN
CLERK

MANUEL CALAS,

Petitioner-Appellant

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ William H. Pryor
UNITED STATES CIRCUIT JUDGE

APPENDIX B

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20905-CIV-MIDDLEBROOKS/JOHNSON

OSCAR CASTILLA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

_____/

FILED by _____ D.C.

FEB 11 2004

CLARENCE MADDOX
CLERK, U.S. DIST. CT.
S.D. OF FLA. – W.P.B.

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT & RECOMMENDATION

THIS CAUSE comes before the Court upon the Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. 2255 filed on April 15, 2003 (DE I). The Court has reviewed the Motion, the Magistrate Judge's Report and Recommendation and the Petitioner's Objections to the Magistrates Report and Recommendation. Accordingly, for the reasons set forth in the Magistrates Report and Recommendation, it is

ORDERED and ADJUDGED that the Motion be and is hereby DENIED. It is further ORDERED arid ADJUDGED that Respondent's Motion for Rule 11 Sanctions also be and is hereby DENIED. The Clerk of Court shall CLOSE this CASE. All pending motions not otherwise ruled upon

are DENIED as MOOT.[1]

DONE and ORDERED in Chambers at West Palm Beach Florida this 10 day of February, 2004.

/s/Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

---

[1] Specifically, Petitioner's Request for a hearing set forth in his Objections to the Magistrate's Report and Recommendation (DE 17). The Court has thoroughly considered the merits of Petitioner's Request for Hearing and has determined that the factual record conclusively shows that the Petitioner is entitled to no relief and so that therefore, a hearing is unwarranted. *See Aron v. United States*, 291 F.3d 708, 714 (11th Cir. 2002).

CLOSED
CIVIL
CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20884-CIV-MIDDLEBROOKS/JOHNSON

MANUEL CALAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

FILED by _____ D.C.

MAR 3 2004

CLARENCE MADDOX
CLERK, U.S. DIST. CT.
S.D. OF FLA. – W.P.B.

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT & RECOMMENDATION

THIS CAUSE came before the Court upon the Petitioner's Motion to Vacate. Set Aside or Correct Sentence pursuant to 28 U §2255 filed on April 11, 2003 (DE 1). The Court has reviewed the Motion, the Magistrate Judge's Report and Recommendation, and the Petitioner's Objections to the Magistrate Judge's Report and Recommendation. Petitioner urges the Court to conduct an evidentiary hearing or remand the case to Magistrate Judge Johnson to conduct such a hearing. The Court considered the merits of Petitioner's argument. The factual record conclusively shows that the Petitioner is not entitled to relief and therefore a hearing is not warranted. *See Aron v. United States*, 291 F.3d 708, 714 (11th C 2002). Accordingly, for the reasons set forth in the Magistrate Judge's Report and Recommendation, it is

ORDERED AND ADJUDGED that the Motion is hereby DENIED. It is FURTHER ORDERED AND

ADJUDGED that this case is hereby CLOSED and any pending motions are hereby DENIED AS MOOT.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 2 day of March 2004.

/s/Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Johnson
All Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20884-CIV-MIDDLEBROOKS/JOHNSON
CASE NO. 03-20884-CIV-MIDDLEBROOKS/JOHNSON
(CASE NO. 92-230-Cr-MIDDLEBROOKS/JOHNSON)

MANUEL CALAS,
OSCAR CASTILLA

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent,

FILED by JCC D.C.

DEC 2 2003

CLERK, U.S. DIST. CT.
S.D. OF FLA. – W.P.B.

OMNIBUS REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Petitioners', Manuel Calas ("Calas") Amended Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (D.E. #3 in Case No. 03-20884-CIV-Middlebrooks) and Oscar Castilla ("Castilla"), Motion to Vacate Sentence (D.E. #1 in Case No. 03-20905-CIV-Middlebrooks). These matters were referred to the undersigned United States Magistrate Judge by the Honorable Donald M. Middlebrooks, United States District Judge for the Southern District of Florida, and are now ripe for judicial review. For the following reasons the undersigned respectfully recommends said Motions to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody be denied.

I. BACKGROUND

Manuel Calas was the executive Vice President and Oscar Castilla was a Senior Vice President of the Republic National Bank of Miami ("RNB"). Indictment 92-230-Cr, alleged that three distinct conspiracies to defraud RNB had been practiced by several defendants, including Calas and Castilla (collectively the Petitioners"). According to the indictment Petitioners along with other co-conspirators sought to: (I) manipulate RNB's acquisition and development of four bank branch sites; (2) induce RNB to sell to the defendants' nominees parcels of foreclosed real estate at prices below fair market value; and, (3) improperly extend bank loans to companies in which Calas and De La Mata, the Bank President, held concealed ownership interests. Calas was named in all but one of the indictment's counts and Castilla was named in all but three of the counts.

During the pre-indictment proceedings, Calas and Castilla retained the law firm of Zuckerman, Spader, Taylor and Evans to represent them. Specifically, the firm's senior partner, Michael Pasano, was hired as the Petitioners' joint counsel. Mr. Pasano is highly regarded in the legal community with a national practice in the representation of individuals charged with federal crimes. Prior to entering private practice, Mr. Pasano served in this district as an Assistant United States Attorney in the Fort Lauderdale office. At the time of the Petitioners initial appearance and at subsequent arraignments the Assistant U.S. Attorney assigned to the case brought to the attention of the Court, as well as the Petitioners, the potential dangers arising from joint representation in this case. (D.E. #153 in Case No. 92- 230-CR at 25). On each occasions both Calas and Castilla indicated their desire to continue with their jointly retained counsel. Shortly after the preliminary proceedings and in recognition of the potential dangers resulting from such joint representation,

counsel for the United States moved for a formal hearing to resolve the issue pursuant to Fed. R. Crim. P. 44(c) and U.S. v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975). (D.E. #101 in Case No. 92-230- CR).

At the Garcia hearing held on June 19, 1992, the Court made it a point to advise the two Petitioners of the possibility of a future conflict of interest arising from the joint representation and that they had the right to retain other counsel if they so desired. (D.E. #154 in Case No. 92-230-CR). Magistrate Judge Turnoff then went on to detail the specific types of conflicts which could arise under the circumstances then existing. Specifically, Magistrate Judge Turnoff informed the Petitioners that difficulties could arise in plea negotiations if one client was offered a deal which entailed testimony or cooperation inculpatory of the other. Magistrate Judge Turnoff further explained that similar problems could emerge at the pre-trial motion stage in that jointly retained counsel could be dissuaded from seeking a severance for one defendant on the basis of an alleged disparity of the evidence as against each client. Moreover, it was noted that Mr. Pasano's divided loyalty might disadvantage a defendant at trial since counsel would not be able to mount a "shifting blame" defense. Lastly, Petitioners were warned that they could be harmed at sentencing in that their attorney might not be able to argue that one client was less culpable than the other. Each Petitioner was then afforded a chance to address the Court outside the presence of the other petitioner on the matter. Id. at 15. In so doing, each Petitioner stated that he understood the potentiality for such conflicts but still expressed an unyielding desire to keep Mr. Pasano as counsel. Id. at 20, 38-39. Notwithstanding the comprehensiveness of the proceeding, the United States requested an even more searching inquiry to be conducted on an individualized basis, which would specifically safeguard the record from "collateral attack." Magistrate Judge Turnoff

accepted the Government's invitation to so proceed. Id. at 52. Thus, the urgency and message that there was potential danger in proceeding with dual representation was neither fleeting nor trivial. Id. Petitioners each signed a waiver stating that they understood and agreed to waive all rights to raise the matter on appeal or through collateral attack. Id. at 32, 44. These waivers were read aloud before the Court to ensure that each Petitioner understood the rights he was agreeing to waive, Id. at 31-32, 44. The Court accepted the waiver with the observation "I have never seen a more clear, unequivocal statement." Id. at 44. As a final precaution, the Court requested that each Petitioner articulate in his own words their understanding of the rights they were foregoing. Id. at 49, 50-52. The Court made it known that Mr. Pasano was a highly respected attorney and that he agreed to inform the Court and the Petitioners if any conflict actually arose at any point throughout his representation so that the matter could be readdressed at that time. Id. at 14-15.

During trial, the Petitioners, together with two other defendants, presented a fully united position orchestrated by Mr. Pasano. Pasano argued that the defendants lacked the requisite criminal intent since the transactions in question were undertaken in RNB's economic self interest and did not result in financial harm. (D.E. #564 in Case No. 92-230- CR at 137-60). Further arguments alleged that the defendants, acting together as a group, presumed that RNB was aware of their conflict of interests and that they were not required to formally disclose their participation. Id. at 172-75. Without antagonism or conflict, Mr. Pasano made sure to emphasize Castilla's minor role in the transactions and invited the jury to consider the disparity in the evidence between Castilla and the other defendants. (D.E. #564 in Case No. 92-230-CR at 160).

Despite the defendants' arguments, Calas and Castilla were convicted on December 30, 1992 for offenses relating

to bank fraud, money laundering and racketeering. (D.E. #s 346, 347 in Case No. 92-230-CR). Petitioners did, however, receive the only acquittals, having been found not guilty of certain charges arising from their involvement with a foreclosed property. Id.

The Petitioners continued their joint representation throughout the sentencing phase of the trial, with Castilla seeking mitigation based on his minor involvement. (D.E. #392 in Case No. 92-230-CR). Both the petitioners were sentenced on April 23, 1993 with Calas receiving al 09 month sentence and Castilla receiving a 97 month sentence. (D.E. #s 454,455 in Case No. 92-230-CR).

Mr. Pasano continued to represent the Petitioners through their initial appeal. Gov't Response, p. 9. However, due to the trial judge being the focus of a pending criminal investigation, the briefing schedule was vacated and the matter returned to the district court for proceedings with respect to the issue of the judge's recusal. Id. Throughout the course of the litigation which lasted five years, Castilla continued to be represented by Mr. Pasano. Id. Once the briefing schedule was revived for the appeal from the merits of their conviction, Calas was represented by the law firm of Black, Srebnick and Kornspan. Id. Although Castilla and Calas were represented by separate counsel during the appeal, the defendants continued to present a coordinated effort. Id. Neither Petitioner raised the issue of Mr. Pasano's competence at trial nor that he was in any way hampered in their defense due to a conflict of interest. Id. Despite arguments that there was insufficient evidence to support Castilla's convictions, all the previous judgments entered by the district court against the defendants were affirmed. See U.S. v. De La Mata, et. al., 266 F.3d 1275 (11th Cir. 2001), cert. denied 535 U.S. 989 (2002).

II. LEGAL ANALYSIS

Petitioners have filed the instant habeas petition contending they were denied their Sixth Amendment right to counsel by virtue of the alleged conflict resulting from counsel's joint representation. Specifically, Petitioners claim their shared counsel was ineffective: (1) during the pre-trial proceedings by failing to suitably conduct plea negotiations and neglecting to move for a severance on the ground that one defendant would then provide exculpatory testimony on behalf of the other; (2) during the trial and sentencing phase by failing to call either defendant to testify, making the wrong choices in selecting the witnesses to be summoned, ineffectually cross-examining the government's witnesses and in failing to focus on Castilla's comparative lack of culpability; and (3) during the appeal by adopting the factual statement and certain legal arguments of co-counsel and by failing to argue that Castilla had been prejudiced by his concurrent representation. Apart from the fact that Petitioners have indisputably waived each and every allegation they now make in connection with their joint representation, the claims raised are, on a substantive level, wholly meritless.

A. Movants Have Indisputably Waived Any Objections To Their Joint Representation

The right to conflict-free counsel is a fundamental right protected by the Sixth Amendment of the United States Constitution. However, federal courts have held that such a right can be waived, as long as the waiver is made knowingly and intelligently. U.S. v. Garcia, F.2d 272, 276- 77 (5th Cir. 1975). In order for a waiver to be knowing and intelligent, the defendant must be informed: (1) that a conflict of interest exists; (2) of the consequences to his defense from proceeding with the conflicted counsel; and, (3) that he has a right to be represented by other

counsel. Duncan v. Alabama, 881 F.2d 1013, 1017 (11th Cir. 1989).

A defendant's choice to proceed with an attorney concurrently representing a co defendant raises a presumption of a valid waiver. Wheat v. United States, 486 U.S. 153, 164 (1988). That presumption becomes irrefutable when a defendant persists in his decision to be jointly represented after a judicial officer has advised him that a conflict may exist, explained the nature of the consequences of that conflict and informed the defendant of the right to independent counsel. Duncan v. Alabama, 881 F.2d 1013, 1017-18 (11th Cir. 1989); United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975). While a district court is always entitled to override a defendant's deliberate choice of concurrent representation, it should do so only if it discerns an existing conflict which will deprive the defendant of competent counsel. United States v. Register, 182 F.3d 820, 830-32 (11th Cir. 1999).

In the instant case, Petitioners clearly waived their rights to representation by conflict- free counsel. On June 19, 1992, the Court, at the request of the prosecution, conducted a Garcia Hearing to determine whether separate counsel was warranted in this matter. During the hearing, the prosecutor clearly stated each potential conflict for the Court in the presence of Petitioners and their counsel. These potential conflicts were repeated by the Court for the Petitioners. In fact the Court even presented specific examples where potential conflicts could arise so that the Petitioners could gain a better understanding of the seriousness of what was being discussed. For instance, the Court specifically pointed out the possibility for a potential conflict if a plea bargain were to be offered or if, during sentencing, the evidence against one Petitioner were greater than against the other. Once the Court explained to each Petitioner what conflicts could arise, each Petitioner was asked to state in his own words

what he understood of the discussion. Petitioners indicated for the record that they understood the potential for conflicts of interest to arise during their joint representation and that they also understood the dangers such conflict could impose. The Court further explained to Petitioners, that they had the right to obtain other counsel if they so desired and that if they could not afford other counsel, one would be provided for them. However, each Petitioner, again in his own words, expressed the desire to retain Mr. Pasano as Counsel, despite any potential conflicts. Lastly, the Court explained the rights Petitioners were agreeing to waive and that such waiver would prevent them from later bringing a charge of ineffective assistance of counsel in collateral attacks. Again, Petitioners stated their understanding of the waiver to the Court in their own words and signed a written waiver agreement which, as an added precaution, was read aloud by each Petitioner into the record.

In light of the Court's extensive and searching inquiry during the Garcia hearing, it cannot be said that Petitioners' clear and unequivocal waivers were not made knowingly or intelligently. To find otherwise would simply defy reason. As the Magistrate Judge repeatedly observed during the proceeding, the allocutions made were unprecedented and went far beyond the basic requirements for knowing and intelligent waivers. Indeed, so extensive and searching was the proceeding that at one point Petitioners asserted that the prosecution was seeking in bad faith to divest them of their chosen counsel. It is clear from the above and foregoing that the Magistrate Judge's determination that Petitioners fully understood their rights and the nature and consequences of joint representation and that their executed written waivers were knowing, intelligent and voluntary was not clearly erroneous.

As such, each and every claim raised by Petitioners herein has been waived. Wheat 486 U.S. at 164.

B. Even Assuming Ineffectual Waiver, Petitioners Can Not Demonstrate Actual Conflict Which Adversely Affected Their Counsel's Performance

Even assuming the Petitioners could somehow establish their waiver was ineffectual, denial of their habeas petitions would still be mandated because they unquestionably have failed to establish that an actual conflict of interest tainted their counsel's efforts, and that such concurrent representation had an adverse impact on their counsel's performance. The law is well established that joint representation is not a *per se* violation of the right to effective assistance of counsel. Berger v. Kemp, 483 U.S. 776, 783 (1987). Instead, a claim of ineffective assistance of counsel for undertaking joint representation warrants relief only upon a petitioner's showing that "an actual conflict of interest" tainted concurrent counsel's efforts, and that the divided loyalty "adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); United States v. Novaton, 271 F 968, 1012 (11th Cir. 2001). Petitioners have failed to satisfy either of these requirements.

1. Petitioners Have Failed To Establish An "Actual Conflict"

In order to prove that an actual conflict existed, Petitioners must make a factual showing of inconsistent interest or point to specific instances in the record to suggest the conflict exists. Freund v. Butterworth, 165 F 3d 839 (11th Cir.1999). These facts cannot be speculative or merely indicative of a hypothetical conflict of interest. Burden v. Zant, 24 F.3d 1298, 1305 (11th Cir. 1994). The Petitioners each fail to identify suitable facts which demonstrate that their attorney, Mr. Pasano, labored under an "actual conflict". While Pasano admittedly did not pursue

a plea agreement or a Motion for Severance in the instant case, that in and of itself is insufficient to show that Pasano's failure to do so was due to a conflict of interest. In fact, the trial strategy used by all of the defendants in this case, even those not represented by Pasano, was to present a united front in which each defendant adamantly maintained his innocence. Pasano stated that due to the nature of the defense strategy no conflict of interest existed as the Petitioners' claims of innocence were not inconsistent with each others' defense. This Court agrees, finding there was no conflict between the defendants arising from the theory of the case, and no antagonistic defenses readily available or which could plausibly have been advanced. Instead, each Petitioner individually participated in and sought to support the single, unified defense presented. Pasano was never forced to choose between evidence, testimony or argument that would benefit one client and hurt the other. Since there was full agreement between and amongst the defendants on all factual and legal issues presented on their behalf, the Court finds that Petitioners herein have not pleaded and cannot demonstrate the existence of an "actual conflict." Indeed, the lack of an "actual conflict" is attested to by the present Motions, in which each Petitioner complains of the same prejudice arising from Pasano's joint representation. It defies logic to believe that both defendants were identically prejudiced by their counsel's conflicted loyalty. To the contrary, even on collateral attack, Petitioners have maintained a united front.

2. Petitioners Have Failed To Demonstrate An "Adverse Impact"

Even assuming that the Court could somehow find an "actual conflict" existed in this case, the Petitioners would still be unable to establish that the conflict had an adverse impact on their counsel's performance as required. U.S. v. Novaton, 271 F.3d at 1012; Yeck v. Goodwin, 985 F.2d 538,

541 (11th Cir. 1993). In Freund the Eleventh Circuit articulated the elements required to prove adverse effect:

> To prove adverse effect, a [defendant] must satisfy three elements. First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts ... Finally, he must show some link between the actual conflict and the decision to forego the alternative strategy of defense.

Freund, 165 F.3d at 860.

In light of the above formulation, this Court believes that neither Petitioner has pleaded, nor can establish, that an actual conflict "adversely affected" Mr. Pasano's performance. While each Petitioner has claimed to have been adversely affected by their counsel's "actual conflict", they have both failed to plead and to establish by citation to "specific instances in the record" the manner by which they were prejudiced. Id. at 859.

Petitioners allege that their joint representation deprived them of the opportunity to make a favorable plea bargain. However, claims under this rubric require a showing that a plea offer was made, and would have been accepted but for counsel's conflicted loyalty. U.S. v. Pena, 233 F. 3d 170, 175 (2d Cir. 2000); Kinsberry v. U.S., 202 F. 3d 1030, 1032 (8th Cir. 2000); U.S. v. Boone, 62 F.3d 323, 327 (10th Cir. 1995).

In the instant case, the United States never made either Petitioner a plea offer or otherwise indicated a willingness to accept a plea bargain from these defendants. Conversely, neither Petitioner has alleged nor shown any support in the record for necessary claims that they were amenable to a plea offer. This Court finds the opposite is true since during the Garcia Hearing both Petitioners profusely maintained their innocence. Hence, the Court

finds that Calas and Castilla have failed to establish that plea negotiations were a viable alternative approach, or that counsel's joint loyalty prevented either or both of them from so disposing of the charges.

The Petitioners further contend that they were adversely affected by counsel's failure to seek a severance on the grounds of a disparity in the amount of evidence, or so that one defendant could testify on behalf of the other. This Court agrees with the Government that such a motion would have been a fruitless endeavor since the Petitioners were jointly charged in two conspiracies, as co-venturers in the overall racketeering conspiracy, and as co defendants in literally scores of substantive offenses. Their respective financial stakes in the charged transactions were fairly even. Accordingly, the Petitioners joinder for trial was not only permissible, but favorable for the defendants, the prosecution and the court. This is especially true in this case where the Petitioners did not present conflicting or antagonistic defenses, but offered, along with the other defendants, a unified, collective defense of lack of intent to defraud. Based on these facts, separate trials would have entailed exactly the same witnesses, testimony, evidence and arguments.

Additionally, Pasano's joint representation of Petitioners did not dissuade him from highlighting, both during the presentation of evidence, and in his summation, the alleged comparative lesser culpability of Castilla. With respect to this issue, Pasano's putative conflict did not hinder his ability to mount an argument which, in a joint trial, was far more compelling than had it been raised in a separate proceeding where the jury would have been unaware of the total amount of evidence marshaled against each defendant. Additionally, neither the jury, district judge, probation office nor Court of Appeals accepted the argument that Castilla played a significantly lesser role in the conspiracy than did his co-conspirators.

Petitioners also contend that counsel's dual loyalty injured them in the selection of defense witnesses, the cross-examination of government witnesses and in their decisions not to testify on their own behalfs. This Court agrees with the Government that such claims fly in the face of counsel's performance at trial since Pasano was, in substance, the lead attorney who handled the bulk of the cross-examination and legal argument on behalf of the entire defense team. Counsel's strategic decisions at trial cannot be said to have been manifestly affected by his dual retainer. Counsel succeeded in calling a score of witnesses and successfully cross-examined the prosecution's witnesses on the crucial points for the defense team. The other two independent attorneys for the co-defendants were in full agreement with Pasano's approach as evidenced by their participation and cooperation with it, thereby demonstrating that it was the most viable defense available to the defendants.

The basis of the defense was the profit and loss figures in the transactions at issue, the economic impact of those dealings and the applicability of the disclosure requirements. Due to the nature of the defense, Petitioners' testimony would have added little since Petitioners' testimony was irrelevant and potentially counterproductive, exposing them to potentially withering cross-examination and opening the door for the introduction of a series of devastating uncharged similar acts. Lastly the decision on whom to call and the thrust of the cross-examination were not affected by Mr. Pasano's joint representation, given the lack of antagonism between the two Petitioners. Therefore, Mr. Pasano had a free hand in his handling of witnesses and in the fashioning of trial strategy in his defense of Petitioners.

As for sentencing, Castilla asserts that his joint representation prevented him from having his lesser involvement highlighted which resulted in his not obtaining a

mitigation of sentence. The Court finds this claim equally without factual basis since Pasano took great pains to emphasize Castilla's lesser role both during the defendant's case and in his summation. Furthermore, Pasano objected to Castilla' s PSI, urging that Castilla receive a mitigation of his offense level on the ground that he was a minimal participant. Hence, Pasano's dual loyalty did not prevent him from calling attention to Castilla's allegedly lesser culpability.

Castilla additionally contends that Pasano's conflict adversely affected his appeal because Pasano adopted Calas' statement of facts, which prevented Castilla from presenting his own version of the facts. Castilla claims that his version of the facts would have emphasized the relative dearth of evidence against him. The Court believes this contention to be without merit on the ground that the appellants chose to present a universal statement of the facts so they could maximize the page lengths of their briefs. In fact, Pasano used the additional space to make a detailed argument with respect to the evidence against Castilla, which the Court of appeals simply rejected.

Finally, Petitioners assert that Pasano failed to raise the issue of their joint representation on appeal, which Petitioners believe would have been the most viable appellate argument. This Court agrees with Petitioners that it is significant that the issue of joint representation was not raised on appeal. However, the Court finds that the omission supports the Government's position that the issue was not raised by Pasano on appeal because it was devoid of merit. Calas, who was represented by the firm of Black, Srebnick and Kornspan during the final appeal, never spoke of the issue nor of the possibility of it as a ground for appeal with his new counsel. Had there existed a problem with Petitioners' joint representation, the Court believes that Calas' counsel would not have hesitated to raise the matter on appeal. Instead, Calas' counsel chose to

adopt the position formerly taken by Pasano, thereby strengthening the Government's position that Pasano effectively represented Petitioners throughout each stage of the judicial process.

In accordance with the above and foregoing it is hereby,

RECOMMENDED That Calas' Amended Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (D.E. #3 in Case No. 03-20884-CIV-Middlebrooks) and Castilla's, Motion to Vacate Sentence (D.E. #1 in Case No. 03-20905-CIV- Middlebrooks) be **DENIED**.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Donald M. Middlebrooks, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745(11th Cir. 1988), cert. denied, 488 U.S. 958 (1988); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (llth Cir. 1993).

RESPECTFULLY SUBMITTED, this December 1, 2003, at West Palm Beach, Florida.

/s/Linnea R. Johnson
LINNEA R. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

CC: Hon. Donald M. Middlebrooks
Stephen Schlessinger, Asst. United States Attorney
Peter Goldberger, Esquire
Donald F. Samuel, Esquire

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20904-CIV-MIDDLEBROOKS/JOHNSON

OSCAR CASTILLA

Plaintiff,

vs.

UNITED STATES OF AMERICA

Defendant.

_____/

FILED by ___D.C.

APR 14 2004

CLARENCE MADDOX
CLERK, U.S. DIST. CT.
S.D. OF FLA. – W.P.B.

ORDER ON APPLICATION FOR CERTIFICATE OF APPEALABILITY

THIS CAUSE comes before the Court upon the Petitioner Oscar Castilla's Application for Certificate of Appealability filed April 7, 2004 (DE 22). The Court has reviewed the record and is otherwise fully informed of the premises.

"A [Certificate of Appealability] may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. §2253©)(2), and "shall indicate which specific issue or issues satisfy the showing required by [the statute]." *Id.* the Court thoroughly considered Petitioner's Objections to Magistrate Johnson's Report and Recommendation and finds that Petitioner has not made the requisite showing to warrant the issuance of a Certificate of Appealability in this case. Accordingly, it is

ORDERED and ADJUDGED that the Motion (DE 22) be and is hereby DENIED.

DONE and ORDERED in Chambers, at West Palm Beach, Florida this 14 day of April, 2004.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20884-CIV-MIDDLEBROOKS/JOHNSON

MANUEL CALAS,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

_____/

FILED by DM D.C.
APR 14 2004
CLARENCE MADDOX
CLERK, U.S. DIST. CT.
S.D. OF FLA. – W.P.B.

ORDER ON APPLICATION FOR CERTIFICATE OF APPEALABILITY

THIS CAUSE comes before the Court upon the Petitioner Oscar Castilla's Application for Certificate of Appealability filed April 7, 2004 (DE 20). The Court has reviewed the record and is otherwise fully informed of the premises.

"A [Certificate of Appealability] may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. §2253(c)(2), and "shall indicate which specific issue or issues satisfy the showing required by [the statute]." *Id.* the Court thoroughly considered Petitioner's Objections to Magistrate Johnson's Report and Recommendation and finds that Petitioner has not made the requisite showing to warrant the issuance of a Certificate of Appealability in this case. Accordingly, it is

ORDERED and ADJUDGED that the Motion (DE 20) be and is hereby DENIED.

DONE and ORDERED in Chambers, at West Palm Beach, Florida this 14 day of April, 2004.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: all counsel of record

APPENDIX E

172 F.3d 806

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Angel CERCEDA, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Courtney Ricardo Alford, a.k.a. "Rickey" Edward Bernard Williams, a.k.a. "Bernard" Nathaniel Dean, Defendants-Appellees.

United States of America, Plaintiff-Appellant,
v.
Hector Fernandez-Dominguez, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Jesus E. Cardona, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Carlos Hernandez, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Jose Herminio Benitez, a.k.a. "William Muniz," a.k.a. "Emilio," Heriberto Alvarez, Elpidio, Pedro Iglesias-Cruz, a.k.a. "Budweiser," Defendants-Appellees.

United States of America, Plaintiff-Appellant,
v.
Minnie Ruth Williams, Ralph W. Corker,
Defendants-Appellees.

United States of America, Plaintiff-Appellant,
v.
Hiram Martinez, Jr., Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Diogenes Palacios, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Fred De La Mata, Manuel A. Calas, Oscar Castilla and
Enrique Fernandez, Defendants-Appellees.

United States of America, Plaintiff-Appellant,
v.
Steven Johnson, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Francisco Jose Arias, Gustavo Javier Pirela-Avila,
Defendants-Appellees.

United States of America, Plaintiff-Appellant,
v.
Enrique Acosta, Milciades Jiminez,
Defendants-Appellees.

United States of America, Plaintiff-Appellant,
v.
Carlos A. Zapata, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Jose Michael Vilarino, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Victor Long, Israel Ael, Miguel Campos, Jose Visozo
Narcisco Suarez, and Oscar
Karin, a.k.a. Mas, Defendants-Appellees.

United States of America, Plaintiff-Appellant,
v.
Diogenes Palacios, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Zaida Fatima Borge, a.k.a. Gorda, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Francis Joseph Bradley, a.k.a. Frank Bradley,
Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Jaime A. Durango, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Zaida Fatima Borge, a.k.a. Gorda, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Nathaniel Dean, Edward Bernard Williams,
Defendants-Appellees.

Nos. 95-4628, 95-4610 to 95-4613, 95-4617, 95-4618, 95-4626, 95-4629 to 95-4635, 95-4659, 95-5298, 95-5369, 95-5566, 96-4584, 96-5043 and 96-5067.

April 16, 1999.

*809 William A. Keefer, U.S. Atty., Adalberto Jordan, Asst. U.S. Atty., Miami, FL, for United States.

* * *

*810 * * *Roy E. Black, Black & Seiden, Miami, FL, for Martinez in 95-4626 and Calas in 95-4630.

Guy Richard Strafer, Quenon, Strafer & Scola, P.A., Miami, FL, for De La Mata in 95-4630 and Ael in 95-4659.

Michael S. Pasano, Zuckerman, Spaeder, Taylor & Evans, Miami, FL, for Castilla in 95-4630.

Paul Rashkind, Asst. Fed. Pub. Defender, Miami, FL, Kathleen J. Cooper, Asst. Fed. Pub. Defender, Ft. Lauderdale, FL, for Fernandez in 95-4630.

* * *.

Appeals from the United States District Court for the Southern District of Florida.

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT and HULL, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

These appeals require us to determine whether a judge's failure to recuse himself from criminal cases in which recusal was required necessitates vacating the resulting judgments and sentences. We conclude that, in these cases, it does not.

I.

Judge Michael K. Moore of the Southern District of Florida was notified in November 1992 that he was the subject of a federal grand jury investigation in the Eastern

District of New York.[1] Eleven *811 months later, in October 1993, the investigation was reported in two Miami newspapers. Immediately after these stories appeared, Judge Moore recused himself *sua sponte* from all cases in which the United States was a party.

The appellees in these cases are criminal defendants who had been tried and/or sentenced by Judge Moore between November 1992 and October 1993. Each moved for a new trial and/or sentencing hearing on the ground that Judge Moore should have recused himself from their cases in November 1992, when he first learned of the investigation, rather than in October 1993, when the investigation became public. The defendants' motions were assigned to Chief Judge William C. O'Kelley of the Northern District of Georgia,[2] who concluded that Judge Moore should have recused himself in November 1992 and that the appropriate remedy for his failure to do so was vacatur. He therefore granted the motions. The Government appealed, and a panel of this court affirmed. We granted rehearing en banc.[3]

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[1] The facts of this case are set out more fully in the panel opinion. *See United States v. Cerceda,* 139 F.3d 847 (11th Cir.), *vacated,* 161 F.3d 652 (11th Cir.1998) (en banc). We therefore present only a brief summary here.

[2] We refer to him as "Chief Judge," even though he no longer is, because that is the position Judge O'Kelley held at the time he was assigned these cases and entered some of the opinions and orders in them. *See, e.g., United States v. Garrudo,* 869 F.Supp. 1574, 1575 (S.D.Fla.1994).

[3] As a threshold matter, we must address the jurisdictional issue raised by the two appellees in United States v. Cerceda, No. 95-4628, and United States v. Hernandez, No. 95-4613. In those two cases, Chief Judge O'Kelley ordered a new trial as to sentencing only, and the appellees contend there is no statutory basis for an appeal of such orders. We disagree. Congress has provided the government may appeal from "a decision,

II.

We first consider the district court's holding that Judge Moore violated 28 U.S.C. § 455(a)[4] by failing to recuse himself from presiding at the defendants' trials and/or sentencing hearings. *See United States v. Garrudo*, 869 F.Supp. 1574, 1581 (S.D.Fla.1994).[5] The panel opinion

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(... Continued)

judgment, or order of a district court ... granting a new trial after verdict or judgment." 18 U.S.C. § 3731 (1994). That section provides that its provisions "shall be liberally construed to effectuate its purpose." *Id.* The Supreme Court has said that "the purpose of the section was to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337, 95 S.Ct. 1013, 1019, 43 L.Ed.2d 232 (1975); *accord, United States v. Posner*, 764 F.2d 1535, 1538 (11th Cir.1985) ("it seems clear that [§ 3731] is designed only to prevent government appeals that would violate double jeopardy or interfere with an ongoing trial."). Liberally construing § 3731 to effectuate its purpose, we hold that "a new trial after verdict or judgment" includes a new sentence proceeding.

Cerceda also argues that the government's notice of appeal in his case was untimely, because it was filed more than 30 days after the judgment, and under *United States v. Rogers*, 788 F.2d 1472, 1475 (11th Cir.1986), the government's timely motion to reconsider did not stop the running of the Fed. R.App. P. 4(b) 30-day clock. That is correct, but we overrule that holding in *Rogers* for the reasons the Fifth Circuit gave in declining to adopt it. *See United States v. Greenwood*, 974 F.2d 1449, 1467--69 (5th Cir.1992). We hold that a timely motion to reconsider does toll the running of the 30-day period for filing a notice of appeal.

[4] Section 455(a) states that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1994).

[5] The disposition of the defendants' claims was divided into a number of opinions. *Garrudo*, which involved seven defendants

affirmed the district court's holding on this issue, but that opinion was vacated when we granted rehearing en banc in this case. *See United States v. Cerceda*, 139 F.3d 847, 852-55 (11th Cir.), *vacated*, 161 F.3d 652 (11th Cir.1998). Because the judges of the en banc court are equally divided with respect to whether Judge Moore violated section 455(a), the ***812** district court's holding on this particular issue is affirmed by operation of law. *See Reshard v. Britt*, 839 F.2d 1499 (11th Cir.1988) (en banc) (affirming district court's order in its entirety by an equally divided court); *see also Herweg v. Ray*, 619 F.2d 1265 (8th Cir.1980) (en banc), *rev'd on other grounds*, 455 U.S. 265, 102 S.Ct. 1059, 71 L.Ed.2d 137 (1982) (affirming district court's judgment in part by an equally divided court and reversing it in part); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir.1973) (en banc) (affirming district court's order in part by an equally divided court and vacating it in part). The panel opinion remains vacated.[6]

III.

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 2205, 100 L.Ed.2d 855 (1988), the Supreme Court applied a three-factor test to determine whether a judicial action taken in violation of section 455(a) should be remedied by vacatur pursuant to

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(... Continued)

who received new trials, is the only published district court opinion in this case.

[6] By affirming the district court's holding on the violation issue, we are not adopting its reasoning. *Cf. City Nat'l Bank of Miami v. General Coffee Corp.*, 828 F.2d 699, 703-04 (11th Cir.1987) (affirmance without opinion does not imply adoption of the trial court's reasoning). The opinion of a district court carries no precedential weight, even within the same district. *See, e.g., State Farm Auto. Ins. Co. v. Bates*, 542 F.Supp. 807, 816 (N.D.Ga.1982).

Fed.R.Civ.P. 60(b).[7] This test requires a court to consider: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Id.; see also Parker v. Connors Steel Co.*, 855 F.2d 1510, 1526 (11th Cir.1988). In determining that it was appropriate to vacate the judgments and/or sentences in the defendants' cases pursuant to Fed.R.Crim.P. 33,[8] the district court cited the *Liljeberg* factors but made no factual findings under any of the factors. Instead, the court simply concluded that "the third factor identified by the Supreme Court in *Liljeberg* is sufficient by itself to warrant a new trial." *Garrudo*, 869 F.Supp. at 1582. It is appropriate, therefore, for us to consider *de novo* the question of whether vacatur is warranted in these cases. *See City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 556 (11th Cir.1998) ("A district court by definition abuses its discretion when it makes an error of law.") (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996)). In so doing, we apply the three *Liljeberg* factors *seriatim*.

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[7] Rule 60(b) allows a court to vacate a judgment on the basis of, *inter alia*, "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed.R.Civ.P. 60(b)(2).

[8] In three of these cases, Chief Judge O'Kelley denied defendants' motions for new trial but granted them new sentencing hearings, on the ground that Judge Moore became a subject of the investigation between the date they were convicted and the date they were sentenced. Notwithstanding representations to the contrary, there were no separate motions for new sentencing hearings based on the section 455(a) violation. (Of course, by denying the motions for new trial while at the same time granting new sentencing hearings, Chief Judge O'Kelley effectively treated the motions for new trial as motions for new sentencing hearings.)

A.

Our consideration of the first *Liljeberg* factor--risk of injustice to the parties in the particular case--entails a two-element inquiry.[9] A court applying this ***813** factor must consider not only the risk of injustice to the parties from any potential partiality or bias on the part of the judge, but also the risk of injustice posed by the remedy of vacatur itself. Each of these elements warrants separate exposition.

1.

Under the first *Liljeberg* factor, the party seeking vacatur bears the burden of proving that potential bias on the part of the judge presented a risk of injustice to it. A mere showing that the impartiality of the judge might reasonably be questioned clearly is not sufficient to carry this burden; such a showing follows by definition from a

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[9] When a party requests the remedy of vacatur under Fed.R.Civ.P. 60(b) based on a violation of section 455(a), a court applying the first *Liljeberg* factor should consider as a threshold matter whether the motion was made within a reasonable time. *See* Fed.R.Civ.P. 60(b) (requiring party to file motion for relief "within a reasonable time, and [for certain types of motions] not more than one year after the judgment, order, or proceeding was entered or taken"); *Liljeberg*, 486 U.S. at 868, 108 S.Ct. at 2206-07 (stating that vacatur was appropriate "unless it can be said that respondent did not make a timely request for relief"); *id.* at 869, 108 S.Ct. at 2207 (noting that a delay of ten months between affirmance by the Court of Appeals on the merits and the filing of a motion to vacate "would normally foreclose relief based on a violation of § 455(a)"). The defendants in these cases brought their motions for new trial under Fed.R.Crim.P. 33--a rule that, unlike Civil Rule 60(b), has very specific time limits within which a motion must be filed. It is therefore unclear whether the "reasonable time" requirement of *Liljeberg* applies in the criminal context. Because the Government does not contend that the motions were untimely, however, we do not consider the timeliness of each individual defendant's motion.

court's finding that the judge violated section 455(a). *See Liljeberg*, 486 U.S. at 862, 108 S.Ct. at 2203-04. On the other hand, the party seeking vacatur is not required to prove that the judge's potential bias actually prejudiced it by showing, for example, that certain rulings of the judge were erroneous and that the errors were in some way attributable to the judge's potential bias. Among other difficulties, such a requirement often would place a court of appeals in the problematic position of determining whether the rulings indicated by the party were in fact erroneous even though the merits of the party's case were not properly before it. These uninformed or ill-considered determinations of error would have drastic consequences for subsequent appellate review of the party's case on the merits, and might have the effect of foreclosing such review altogether.

Instead, the following two considerations should guide the court in determining whether the party seeking vacatur has met its burden of proving that the potential bias on the part of the judge represented a risk of injustice to it. First, the reviewing court should consider whether the party seeking vacatur has pointed to particular circumstances that may indicate a risk of injustice to that party.[10]

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[10] In cases where the Court of Appeals reviews a district judge's challenged actions and affirms them on the merits either before or at the same time it considers whether the judge violated section 455(a), the possibility of a significant risk of injustice is substantially reduced-- particularly if the review of the merits was plenary. *See Parker*, 855 F.2d at 1526 (concluding that judge's potential bias presented no risk of injustice to party seeking vacatur because court exercised plenary review over merits in same appeal and concluded that district judge's grant of summary judgment was proper); *see also Air Line Pilots Ass'n, Int'l v. Continental Airlines, Inc. (In re Continental Airlines Corp.)*, 901 F.2d 1259, 1263 (5th Cir.1990) (reaching same conclusion where district court had previously affirmed challenged orders of bankruptcy court on merits); *but see Liljeberg*, 486 U.S. at 868 &

Second, the court should consider the seriousness of the violation of section 455(a) that is involved.[11]

***814** Applying these two considerations to the cases before us, we conclude that the defendants have not carried their burden under the first *Liljeberg* factor. In their presentations to the district court in support of their motions for new trial, and in their arguments to this court, the defendants have not pointed out any particular circumstances indicating a risk of injustice to them.[12] With respect to the seriousness of the section 455(a) violation,

(... Continued)

n. 16, 108 S.Ct. at 2207 & n. 16 (recognizing that Court of Appeals panel affirmed on merits over a strong dissent and concluding that "a careful study of [the dissenting judge's] analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues"). All but one of the cases before us today, however, have not yet been subject to appellate review on the merits. The sole exception is *United States v. Cerceda*, 17 F.3d 1439 (11th Cir.1994), which we affirmed pursuant to 11th Cir. R. 36-1 on March 3, 1994.

[11] *Liljeberg*, 486 U.S. at 859, 108 S.Ct. at 2202, indicates that the seriousness of a section 455(a) violation could be mitigated by proof that the judge lacked knowledge of a disqualifying circumstance, and thus bear on the question of the appropriate remedy.

[12] Instead of making any showing of actual prejudice or the risk thereof, the defendants attempted to prevail on either an automatic vacatur or bias *per se* theory, or by focusing on the third *Liljeberg* factor alone. They were successful with that strategy in the district court, but not here. While the defendants got the district court to agree they could offer additional evidence on the violation issue if that court ruled against them on that issue, at no time have they been denied an opportunity to offer any evidence about, or otherwise make a showing on, the remedy issue. They never have requested such an opportunity.

we do of course recognize that the district court concluded that there was such a violation, and that this court has affirmed that conclusion by an equally divided court. However, after careful consideration of the totality of the circumstances, we now hold that the violation thus established was neither egregious nor clear to the judge. In arriving at this conclusion, we have considered the totality of the circumstances, including, *inter alia*, the nature of the violation, the egregiousness thereof, the clarity of the violation, and the reasonableness of the judge's lack of awareness that he was in violation of section 455(a).[13]

We leave open the possibility that in a rare case involving an extremely serious violation of section 455(a), a court might find that the party seeking vacatur has carried its burden under the first *Liljeberg* factor, even if the party has pointed to no particular circumstances indicating a risk of injustice. But this is not such a case. Indeed, six of the twelve judges on this en banc court believe there was no violation of section 455(a) at all, but, assuming a violation, would join the other judges comprising the majority on the remedy issue in concluding that the violation was neither egregious nor readily apparent.

2.

The party opposing vacatur also has a burden to carry under the first *Liljeberg* factor. This party bears the burden of proving that the remedy of vacatur itself poses a risk of injustice to it. *See Liljeberg*, 486 U.S. at 868-69, 108 S.Ct. at 2207 (considering whether it would be "unfair to deprive the prevailing party of its judgment," and finding that "neither [of the prevailing parties] has made a showing of special hardship by reason of their reliance on the original judgment"). In order to determine the risk of injustice that vacatur poses to the Government in these

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[13] By contrast, the violation in *Liljeberg* was inexcusable. *See Liljeberg, id.* at 867, 108 S.Ct. at 2206.

cases, we consider separately the defendants who were granted new trials and those who were granted new sentencing hearings.

We agree with the Government's argument that the remedy of providing new trials to the defendants who have requested them poses a significant risk of injustice to it. The Government certainly would spend significant amounts of time and money in retrying each of these defendants. Resources devoted to retrials in all of these cases would have to be diverted from other cases with the ultimate result that some crime will go unpunished. *See, e.g., J.E.B. v. Alabama,* 511 U.S. 127, 159, 114 S.Ct. 1419, 1437, 128 L.Ed.2d 89 (1994) (Scalia, J., dissenting) ("a retrial will do nothing but divert the [government's] resources, allowing either petitioner or some other malefactor to go free."). Moreover, the long delay between the defendants' original and new trials could seriously compromise the Government's ability to re-prosecute the defendants effectively. This problem is particularly acute in certain cases. With regard to the case of ***815** *United States v. De La Mata,* No. 95-4630, for example, the government would face great hardship if forced to conduct a new trial both because of the complexity of the case (a 78 count, complex white-collar prosecution the trial of which lasted two-and-a-half months) and because a key Government witness was 84 years old and in bad health at the time of the first trial. It is questionable whether that witness--now well over 90 years old--would be capable of again providing the testimony crucial to the Government's case.

Turning to the defendants who received new sentencing hearings, we note that the monetary and temporal costs to the Government from holding such hearings are relatively low. In addition, the Government has not shown that the lengthy delay between the defendants' original and new sentencing hearings would present a special hardship to it in these particular cases. We

conclude, therefore, that the risk of injustice to the Government from granting these resentencing hearings is slight. *See Foster v. United States*, 615 A.2d 213, 220 (D.C.1992); *Belton v. United States*, 581 A.2d 1205, 1215 (D.C.1990).

B.

Next, we examine *Liljeberg* 's second factor--the risk that the denial of relief will produce injustice in other cases. This factor weighs in favor of vacating the judgment when so doing would "encourag[e] a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Liljeberg*, 486 U.S. at 868, 108 S.Ct. at 2206. In this case, vacating the defendants' convictions and sentences is not necessary to deter judges from violating section 455(a), because the Eleventh Circuit Judicial Council has already minimized the risk that similar violations will occur in the future. In September 1996, the Judicial Council adopted a protocol that established guidelines for recusal when a judge is notified that he is the subject or target of a criminal investigation.[14] This protocol should provide substantial guidance to judges who find themselves in a situation similar to that of Judge Moore.

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[14] The protocol states:

> Judicial officers who ... are informed that they are the subject or target of a federal criminal investigation for a crime that is punishable by imprisonment of one year or more may continue with their criminal and civil dockets and administrative duties until the Judicial Council determines to adopt limitations that the nature of the investigation and charges justify. However, after consultation with other judges of his or her court, the implicated judge may discontinue handling civil, criminal and administrative duties that the judge concludes the nature of the investigation and charges justify.

Eleventh Circuit Judicial Council, *Protocol for Judicial Officers in the Eleventh Circuit in the Event of Arrest, Indictment or Possible Criminal Investigation* (Sept. 5, 1996).

Although the protocol does not completely eliminate the risk that other judges will act as Judge Moore did, the risk that they will do so is low enough that vacating the defendants' convictions and sentences would have only a minimal deterrent effect. Instead, the district court's ruling that Judge Moore violated section 455(a), which we (albeit by an equally divided court) affirm, should sufficiently impress upon judges the need to identify and disclose potential grounds for disqualification. Thus, we conclude that there is little risk that denying relief here will produce injustice in other cases.

C.

Finally, we examine the third *Liljeberg* factor--the risk of undermining the public's confidence in the judicial process. Although every violation of section 455(a) creates a risk that the public will lose faith in the judicial system, vacating the trial court's judgment to remedy the violation sometimes increases rather than decreases that risk. This is such a case. As noted above, we hold that the section 455(a) violation, found by the district court and affirmed by this evenly divided en banc ***816** court, is neither egregious nor clear cut. The closeness of the violation issue, and its lack of clarity to Judge Moore, factors into the public confidence calculus. Moreover, the defendants have failed to establish any significant possibility that they suffered any harm because of the circumstances that underlie the section 455(a) issue. For these reasons, the public would lose confidence in the judicial process if the judgments were vacated, because the parties and the courts would be forced to relitigate the case even though the proceedings leading to those judgments seemed completely fair.[15]

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[15] This is especially true when the appellate court has conducted a plenary review of the trial court's judgment--any risk that the trial court's bias tainted the outcome in such a case has been cured by the *de novo* review of the unbiased court of appeals.

This conclusion is particularly valid with respect to the defendants who received new trials, instead of new sentence proceedings, because of the significant risk of injustice that the Government would suffer if it is forced to prosecute these defendants a second time. As we discussed above, *see supra* part III.A.2, the Government would spend substantial amounts of time and money retrying these defendants. Without any specific indication that the outcome in the trial court could have been tainted by bias, the public would most likely find it unjust to require the Government to suffer such costs. Thus, we conclude that there is an appreciable risk that vacating the defendants' convictions would cause the public to lose confidence in our judicial system.[16]

As for the defendants who received only new sentencing hearings, we also conclude that the public's confidence would be undermined if we required the Government to relitigate the trial court proceedings. Without evidence that bias could have tainted the outcome of the hearings, there is a significant risk that the public would

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(... Continued)

Thus, the public would lose confidence in the judicial process if the trial court's judgment were vacated because that costly remedy would be unnecessary to ensure fairness to the parties. *See O'Neill v. Continental Airlines, Inc.* (*In Matter of Continental Airlines*), 981 F.2d 1450, 1463 (5th Cir.1993); *Pfizer Inc. v. Kelly* (*In re School Asbestos Litig.*), 977 F.2d 764, 787 (3rd Cir.1992).

[16] We note that this risk is mitigated by the Judicial Council's protocol, discussed above, establishing guidelines for recusal in the event of a criminal investigation. The protocol reduces the likelihood that similar problems will arise in the future. Thus, although the public would most likely believe that vacating the defendants' convictions is unjust, that belief would be mitigated by the understanding it is unlikely that vacating convictions for such reasons will be necessary again, and thus, that the Government will not have to retry fairly convicted defendants in the future.

find it unjust to require the Government to expend time and money to conduct these proceedings a second time. This risk is lower than the risk involved in granting the defendants a new trial, because the monetary and temporal costs to the Government to resentence the defendants are lower. *See supra* part III.A.2. However, because a substantial risk remains that vacating the defendants' sentences would undermine the public's confidence, we conclude that factor three weighs against vacatur for the defendants who received new sentencing hearings.

IV.

In sum, the three factors identified by the Supreme Court in *Liljeberg* weigh strongly against vacatur in regard to the defendants who received new trials. First, the defendants have failed to show a risk of injustice to themselves while the Government has demonstrated a significant risk of injustice to it should the defendants' convictions be vacated. Second, in light of the recently adopted protocol on the matter, there is little risk that failing to vacate the defendants' convictions in these cases will produce injustice in other cases. Finally, public confidence in the judicial process would be harmed if these convictions--seemingly reached by fair procedures-- were vacated, and the Government was required to retry the defendants.

***817** Those same factors also weigh against vacatur, albeit less strongly, in regard to the cases in which Chief Judge O'Kelley granted only a new sentencing hearing. Although the risk of injustice to the Government is less in vacating the defendants' sentences than in vacating the defendants' convictions (because of the lesser burden of prosecuting a new sentencing proceeding as opposed to a new trial), that lesser risk is balanced against a complete absence of evidence regarding a risk of injustice to the defendants. Therefore, the first factor of the *Liljeberg* test still suggests that the remedy of vacatur is inappropriate.

The second factor of *Liljeberg* weighs against vacatur just as strongly in the sentencing context as in the context of the defendants' convictions. Finally, public confidence in the judicial process is eroded (although perhaps to a lesser degree) by the setting aside of a fair sentence just as it is eroded by the setting aside of a fair conviction.

We therefore conclude that vacatur is an inappropriate remedy for the section 455(a) violation in these cases. Accordingly, the orders of the district court granting new trials and/or new sentencing hearings are REVERSED.

APPENDIX F

266 F.3d 1275

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Fred DE LA MATA, Enrique Fernandez, a.k.a. Henry, Manuel A. Calas, Oscar Castilla, Defendants-Appellants.

Nos. 00-10201, 00-13319.

Sept. 27, 2001.

***1278** G. Richard Strafer, G. Richard Strafer, P.A., Coral Gables, FL, Kathleen M. Williams, Federal Public Defender's Office, Roy E. Black, Black, Srebnick & Kornspan, Michael S. Pasano, Zuckerman, Spaeder, Taylor & Evans, Miami, FL, Martin John Bidwill (Federal Public Defender), c/o Federal Public Defender, Ft. Lauderdale, FL, for Defendants-Appellants.
Anne R. Schultz, Robert M. Sondak, Stephen Schlessinger, Miami, FL, for Plaintiff-Appellee.

Appeals from the United States District Court for the Southern District of Florida.
Before ANDERSON, Chief Judge, and RONEY and FAY, Circuit Judges.

FAY, Circuit Judge:
Fred De La Mata, Manuel A. Calas, Oscar Castilla and Enrique Fernandez ("appellants") appeal their criminal convictions and sentences for bank fraud in violation of 18 U.S.C. § 1344, conspiracy to defraud the United States in violation of 18 U.S.C. § 371, misapplication of bank funds, in violation of 18 U.S.C. § 656, making false statements to a

federally insured financial institution, in violation of 18 U.S.C. *1279 § 1014, money laundering, in violation of 18 U.S.C. § 1956, making or causing to be made false entries, in violation of 18 U.S.C. § 1005, and engaging and conspiring to engage in a pattern of racketeering activities in violation of 18 U.S.C. §§ 1962(c) and(d). Appellants contend that the *ex post facto* clause barred their prosecution, that the indictment and jury instructions were fatally defective, that there was insufficient evidence to support their convictions and that the discovery of new evidence mandated the grant of a new trial. We find that appellants' convictions on two counts of bank fraud violated the *ex post facto* clause, but affirm their convictions and sentences in all other respects.

I. Background

The charges arose out of several transactions involving the Republic National Bank ("RNB" or "the Bank"), a nationally chartered financial institution headquartered in Dade County, Florida. We summarize the facts, viewed in the light most favorable to the jury's verdict.

De La Mata, Calas, and Castilla (hereinafter the "bank insiders") were employed by RNB prior to 1983 until they resigned in the fall of 1988. De La Mata served as RNB's Deputy President until 1985, thereafter as President and Chief Operating Officer, and at all times a member of the Board of Directors. Calas served as the RNB's Senior Vice President until July 1988, and thereafter as Executive Vice President. Castilla was Senior Vice President during the entire period. In addition, De La Mata, Calas and Castilla were all members of RNB's Loan Committee. Fernandez was a local real estate speculator, ostensibly unconnected with RNB.

A. The Bank Branch Transactions

1. The Westlands branch

In May 1983, Calas retained attorney Anthony Silva to act as "trustee" in the purchase of certain real property located in Hialeah, Florida (hereinafter the "Westlands"). Calas, through Silva, obtained a contract to purchase the tract for $325,000, and provided Silva with the money for the initial deposit. Calas also directed Silva to form a corporation called Hialeah Properties, Inc., for the purpose of acquiring the Westlands property. The corporation's shares were initially issued in the name of Daniel Blanco, but that stock issuance was later voided and the shares were divided among De La Mata (50%), Calas (25%), and Castilla (25%). Calas approached Daniel Blanco to head the corporation, which Blanco understood to be a "ceremonial" position since he would not have a financial or operational stake in the corporation. The purpose of his job, according to Blanco, was to act as owner of the property in order to conceal Calas' involvement from RNB.

After procuring the purchase contract, Calas proposed to Luis Botifoll, Chairman of the Board of RNB, that RNB acquire the Westlands site for use as a branch banking facility. Calas did not disclose the bank insiders' financial interest in the property. Silva testified that he also discussed the proposal with Botifoll, fully aware that he was not to reveal the identities of the true parties in interest. Thereafter, Calas arranged for Botifoll to meet Blanco, the purported owner of the Westlands site, whereupon the two, on behalf of RNB and the "trust," negotiated a 30 year lease with an option to purchase the site. The rent commenced at $6500 per month, and escalated each year according to the cost of living. A government expert witness testified at trial that RNB had paid $362,000 above the fair market rental value as of the date of indictment.

On July 21, 1982, RNB's Board of Directors approved

the lease Botifoll had *1280 negotiated. De La Mata participated in the vote, and concealed the bank insiders' personal interest in the transaction. In this way, De La Mata also caused RNB to fail to disclose, in the bank's application to the Office of the Comptroller of the Currency ("OCC") to open a branch facility, the involvement of bank officers in the transaction.

2. The Little Havana branch

In September 1983, Fernandez obtained a purchase contract for $700,000 for a site in Little Havana consisting of a bank building (two ground leases) and its adjoining parking lot (fee simple lot). Fernandez obtained the purchase contract in the name of the Fernandez Land Trust, an entity initially created for the benefit of Fernandez but later secretly amended to include the bank insiders as named beneficiaries accordingly: De La Mata 37-1/2%, Calas 18- 3/4%, Castilla 18-3/4% and Fernandez 25%. Calas provided a substantial portion of the $70,000 that Fernandez tendered as a down payment.

Thereafter, De La Mata proposed that RNB acquire the Little Havana site for use as a branch facility, and introduced Fernandez to Botifoll as the property's owner. At an October 1983 meeting of the RNB Directors, De La Mata participated in discussions to acquire the Little Havana branch building, and initiated the motion to apply to the OCC for a license to open the branch. Ultimately, RNB agreed to lease the Little Havana site for three years at an annual rate of $156,000, and to pay $100,000 per year to maintain an option to purchase the building.

In December 1983, the RNB Loan Committee approved a $700,000 loan to the Fernandez Land Trust, thus, completely underwriting the purchase of the Little Havana property. De La Mata, Calas and Castilla all voted to approve the loan to the Fernandez Land Trust while concealing their interest therein. In effect, the bank

insiders caused RNB to misrepresent to the OCC in its branch opening application that no bank employees were involved in the transaction.

In August 1984, RNB needed additional parking for the Little Havana site. De La Mata proposed that RNB acquire, for an additional $150,000, the adjacent parking lot, the purchase of which RNB had unknowingly financed through the $700,000 loan to the Fernandez Land Trust. At the RNB Board meeting on August 22, 1984, De La Mata concealed his interest in the subject property and voted to approve the acquisition.

At the conclusion of the three year lease, on December 24, 1986, RNB purchased the Little Havana site from the Fernandez Land Trust for $1,000,000, including the option payments. The uncontested appraised value of the property, including the parking lot, was $291,000, resulting in approximately $850,000 loss to RNB.

3. The International Private Banking branch

In March 1984, Calas, Castilla and Fernandez retained attorney William Shockett to represent them in the purchase of property on LeJeune Road, near Miami International Airport. Shockett, as "trustee," entered into a contract to purchase the site for $700,000. Calas and Castilla provided the $70,000 down payment. At some point, De La Mata proposed to bank officials that RNB acquire the property for use as its International Private Banking ("IPB") branch, and arranged for a meeting between Botifoll and Fernandez, who purported to be the site's owner. Although Shockett advised his clients on the necessity of disclosure, Fernandez concealed the identities of his co-venturers from Botifoll.

***1281** Appellants, through a Florida corporation entitled "Real Estate Partners," applied to RNB for a loan to finance the purchase of the IPB site. When Shockett learned that RNB might not only lease, but also finance

and lease back the property from its own officers, Shockett again warned of the conflict of interest and again was reassured that the Bank knew everything. Yet, the financial statement submitted in support of Real Estate Partners' loan application to RNB blatantly misrepresented Fernandez to be the sole shareholder of the corporation. It is undisputed that the shares of Real Estate Partners were divided among De La Mata (37-1/2%), Calas (18-3/4%), Castilla (18-3/4%) and Fernandez (25%).

On June 27, 1984, the RNB Board voted to pursue this site as a branch location. De La Mata participated in the discussion and cast an affirmative vote without disclosing his, or Calas' and Castilla's ownership interest in the property. After some negotiation, RNB entered into an agreement dated August 3, 1984, to lease the IPB site from Real Estate Partners for $165,000 per year with an option to purchase the property and premises after eight years. The evidence at trial showed that RNB paid $510,000 in excess of the fair market rental value during the first seven years of the lease.

On August 9, 1984, RNB's Loan Committee approved two loans, one to Real Estate Partners in the amount of $560,000 and one to Fernandez in the amount of $190,000, the proceeds of which were used to acquire the IPB property. De La Mata, Calas and Castilla all voted to approve the requested loans, without disclosing that they were the recipients. As a result of the bank insiders' deception, RNB filed an OCC bank branch application which failed to disclose the interest of its own officers in the site's acquisition.

On or about April 1, 1985, Real Estate Partners applied to RNB for another loan, in the amount of $180,000, for the construction of additional floor space at the IPB branch site. Calas prepared the paperwork for the loan, and the loan was issued without presentation to, or approval by, the Loan Committee.

Around May of 1987, Real Estate Partners pledged the IPB site and rents due under the pending lease with RNB to Ocean Bank as collateral for a loan in the amount of $1,000,000. Real Estate Partners satisfied its $700,000 debt obligation to RNB, and distributed the remaining proceeds to the appellants.

4. The Orange Bowl branch

In March 1985, Fernandez again retained Shockett to draft a contract, this time for the acquisition of property located near the Orange Bowl in Miami (hereinafter "Orange Bowl" site). Shockett obtained a contract to purchase the property for $300,000 in the name of "Fernandez as trustee." On June 19, 1985, prior to closing, Fernandez assigned the purchase contract to Real Estate Partners.

Acting through Fernandez, Real Estate Partners applied to RNB for financing, again misrepresenting Fernandez as the sole corporate shareholder. In addition, the loan application introduced as evidence at trial revealed that Real Estate Partners received a pre-approved loan on De La Mata's authorization. The loan, in the amount of $250,000, was disbursed to Real Estate Partners on June 19, 1985. The Loan Committee subsequently ratified the loan on June 27, 1985, with De La Mata, Calas and Castilla all voting in favor thereof.

At a meeting of the RNB Executive Committee[17] on September 24, 1985, De La *1282 Mata proposed that RNB acquire the Orange Bowl site for use as a branch facility.

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[17] Established by the Board of Directors, the Executive Committee was composed of Board members and was authorized to make operational and management decisions arising between monthly Board meetings. The Executive Committee was composed, at this time, of Mr. Isaias, RNB's majority shareholder, Dr. Botifoll, Mr. Sastre, Mr. Gonzalez-Blanco, and Mr. De La Mata.

De La Mata revealed that he had already negotiated tentative terms with Fernandez, the purported owner of the property, for the construction of a bank building and a five year lease with option to purchase the property and premises. De La Mata did not disclose to the other directors that the bank insiders owned the Orange Bowl property. Thereafter, Calas took charge of overseeing construction costs and negotiating lease terms.

In the spring of 1986, Real Estate Partners applied to RNB for two loans, the proceeds of which would be used for the construction of the Orange Bowl bank building. In support of this application, Real Estate Partners again submitted a financial statement falsely stating that Fernandez owned 100% of the corporation's stock. The Loan Committee approved the loans at its meeting of June 19, 1986. De La Mata, Calas and Castilla each voted to extend credit without disclosing their personal financial interest in Real Estate Partners.

RNB ultimately decided to purchase rather than lease the Orange Bowl property.[18] Fernandez offered the site and its newly constructed building for $1.15 million, but following negotiations, RNB agreed to purchase the site for $960,000. Given that Real Estate Partners had spent $300,000 to purchase the land, and $277,000 to construct the building (based on cancelled checks from Real Estate Partners' bank account with RNB), plus some incidental costs, appellants realized approximately $380,000 profit on the deal in one year. The Executive Committee approved the purchase price on June 23, 1986, at which time De La

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[18] The evidence showed that the Bank's decision to buy rather than lease the Orange Bowl site was in large part based on the desire to complete and cease further business with Fernandez. Mr. Isaias testified that it had become a hassle to continually obtain Board approval for the rising costs of construction claimed by Fernandez.

Mata cast an affirmative vote while concealing the insiders' conflict of interest.

B. Foreclosed Real Estate ("OREO" properties)[19]

In early 1986, RNB foreclosed on some property that collateralized a defaulted loan. The evidence showed that Calas had been the loan officer on the account, and approximately $200,000 was due on the balance. Appellants created "Great Group Investments" (hereinafter "Great Group"), a Florida corporation, and distributed the shares to De La Mata's family (37-1/2%), Calas (18-3/4%), Castilla (18-3/4%) and Fernandez (25%). Acting as the corporation's owner, Fernandez made an offer to purchase the OREO properties from RNB for $130,000. It had been appraised at $207,000. On February 14, 1986, the committee responsible for reviewing all defaulted loans and approving sales of OREO properties approved the sale to Great Group. De La Mata, a member of this committee, voted in favor of the transaction without disclosing his personal interest in Great Group.

When Great Group applied to RNB for a $100,000 loan to finance the purchase, it ***1283** submitted a financial statement falsely representing Fernandez as the sole shareholder of Great Group. The RNB Loan Committee considered and approved the loan on June 5, 1986. In customary fashion, De La Mata affirmatively voted in favor of the application while concealing the ownership interest of the bank insiders in Great Group. Over the course of the following year, Great Group sold the OREO properties for $340,000, thereby realizing a profit of $210,000. RNB lost $81,000 on the properties.

In October 1986, Calas and Castilla informed attorney

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[19] OREO stands for "other real estate property" signifying property that the Bank had acquired trying to collect loans as distinguished from property used in the Bank's operations.

Shockett that RNB held two defaulted notes secured by real property whose appraised value greatly exceeded the remaining balances due on the loans. At the direction of Calas and Castilla, Shockett formed a corporation named "CSEC," and divided the ownership between Castilla's niece, Myra Espinola and her husband (together 75%) and Shockett (25%). Castilla helped Shockett purchase the defaulted notes by arranging for an unsecured loan in the amount of $100,000 through RNB. Shockett thereafter sold the real estate that served as collateral for these loans at a substantial profit, largely for the benefit of Calas and Castilla.

C. Unrelated Real Estate Ventures

In September 1983, De La Mata approached his friend and RNB client, Jorge Sarria, and identified a vacant lot owned by the EWL Corporation as a potential site for the operation of a gasoline distributorship. Sarria owned and operated gasoline service stations in the Miami-Dade area, and testified that he and De La Mata had a long-standing agreement to invest jointly in a service station when the opportunity arose. The evidence showed that Calas had apparently learned of the opportunity as EWL's account officer at RNB.

De La Mata, Calas and Sarria thereafter entered into an understanding whereby Sarria would receive RNB's financial backing to acquire the lot and construct a retail service station in exchange for De La Mata's and Calas's undisclosed interest therein. Sarria obtained a contract for the purchase of the property in the name of "Sarria and assigns," and assigned the purchase contract to Sarocco, Inc. prior to closing on December 19, 1983. At trial, Sarria testified that Sarocco, Inc. was incorporated on December 9, 1983, and the shares were divided among Sarria (50%), De La Mata (25%) and Calas (25%).

At its December 1983 meeting, the RNB Loan Commit-

tee approved a loan to "Sarria and assigns" in the amount of $425,000 for the acquisition and construction of a gas station. De La Mata initiated the motion to approve the loan, and both De La Mata and Calas voted in favor thereof, without disclosing their financial interest in the venture. Several years later, in November 1986, De La Mata and Calas voted to approve the extension of the loan to $550,000, again without making any disclosure of their personal interest.

In December 1986, De La Mata, through his family members, invested in a real estate development venture named "Estate Land Development." Thereafter, De La Mata facilitated a $313,000 loan to that entity, and formally voted to grant the loan at a meeting of the RNB Loan Committee, without disclosing the fact of his family's 25% interest therein.

II. Procedural History

On April 14, 1992, a federal grand jury sitting in the Southern District of Florida returned an indictment charging De La Mata, Calas, Castilla, Fernandez and corporate co-defendants, Real Estate Partners, Inc. and Hialeah Properties, Inc., on seventy-eight counts arising out of three *1284 separate conspiracies, namely the bank branch transactions, the OREO properties, and the corporate loans. Each count incorporated by reference certain "general allegations" set forth at the beginning of the indictment which described the bank insiders' disclosure obligations under federal banking statutes and regulations, internal bank procedures, and the common law.

Appellants filed numerous pretrial motions to dismiss the indictment arguing, *inter alia,* that the bank fraud and money laundering counts failed to state offenses,[20] that the

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[20] Appellants challenged the acts which the indictment alleged as "executing" the bank frauds, and argued that the indictment failed to charge money laundering offenses separate and distinct

bank fraud and money laundering charges violated the *ex post facto* clause, and that the bank fraud counts were multiplicitous and were barred by the applicable statute of limitations. In addition, De La Mata moved to dismiss charges of making false entries, in violation of 18 U.S.C. § 1005, and of conspiring to defraud the United States, in violation of 18 U.S.C. § 371, on the grounds that appellants did not, as a matter of law, have the legal duties alleged by the government. Calas and Castilla moved to strike as surplusage and to exclude from evidence proof of civil and regulatory disclosure requirements on the grounds that it was improper for the government to rely on a civil violation to prove a criminal act.

The district court, Honorable K. Michael Moore presiding, conducted pretrial hearings regarding the motions on October 13 and 14, 1992. Except for the multiplicity challenge, which the court took under advisement, the district judge denied the defense motions.

Trial commenced on October 15, 1992. The government demonstrated that appellants engaged in a pattern of deception by repeatedly and willfully concealing the bank insiders' personal financial interest in various entities in order to induce RNB to enter into transactions remunerative to the appellants. The government introduced expert and bank witnesses who established the disclosure requirements imposed by federal regulations, as well as RNB's own internal rules prohibiting self-dealing without disclosure and abstention. The government proved appellants' ownership interests in the various entities through uncontroverted documentary evidence, and appellants' intent to deceive the Bank though their own attorneys and "front" men like Blanco.[21]

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from the bank fraud offenses.

[21] Perez testified that he did not know that the bank insiders were involved in the transaction. Silva testified that his ethical

In defense, appellants sought to prove that they lacked intent to financially harm the bank. The bank insiders contended that they did not know they were required to disclose their involvement and to refrain from voting in the proposed transactions because RNB did not have a written code of conduct until 1988. In addition, appellants asserted that, because all material financial terms were disclosed, the failure to disclose the bank insiders' interest did not expose the Bank to a risk of loss that it did not knowingly accept.[22] Arguing that only economic injury was cognizable under ***1285** the bank fraud statutes, appellants requested an instruction informing the jury that "risk of loss" was an essential element of the crimes of bank fraud and misapplication.

The district court denied the defendants' motions for the aforementioned requested jury instructions. However, by order dated December 16, 1992, the district court ruled that certain bank fraud counts were multiplicitous and required the government to elect which bank fraud charges it wanted the jury to consider. As a result of the court striking various counts, the case went to the jury on fifty-nine counts.

The jury returned verdicts adjudging De La Mata and Fernandez guilty as charged. The jury also found Calas and Castilla guilty on all counts, save the substantive offenses arising from the CSEC transaction. The parties

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and legal duties as an attorney precluded him from disclosing the identity of his client. Shockett believed that it was the bank insiders' responsibility to disclose their interest.

[22] Appellants conceded earning substantial profits on the transactions, but countered that RNB had also benefitted. Appellants contended that the loans had been repaid with interest, that the OREO transactions allowed RNB to remove defaulted loans from the books, and that the bank branches had operated successfully.

entered into stipulations regarding the forfeiture counts.[23]

On April 23, 1993, the district court sentenced the appellants, over objection, under the money laundering guidelines. De La Mata, Calas, Castilla and Fernandez were sentenced to terms of imprisonment of 121, 109, 97 and 97 months, respectively, to be followed in each case by a three year term of supervised release. The district court ordered restitution against De La Mata, Calas and Castilla, jointly and severally in the amount of $1,786,194, and against Fernandez in the amount of $1,424,000. In order to strengthen the possibility of restitution, the district court did not impose fines. The district court granted bond, pending appeal,[24] and appellants timely filed notices of appeal. [25]

III. Discussion

Appellants contend (1) that application of the newly

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[23] The parties stipulated to the entry of an Order requiring appellants to transfer their two remaining branch leases to the United States, and permitting the government to hold other property as security on the money judgment portion of the forfeiture.

[24] The district court ruled that appellants had raised an issue which presented a substantial question of law within the meaning of 18 U.S.C. § 3143(b)(2): Whether the court erred in denying an instruction that risk of loss constitutes an element of bank fraud and misapplication of bank funds. *See* Memorandum Order and Opinion dated July 22, 1993.

[25] Appellants initial direct appeal was dismissed in February 1994, when appellants moved for a new trial on the basis that Judge Moore had been under investigation in the Eastern District of New York during appellants' trial. The district court, Hon. William O'Kelley sitting by designation, granted the motion for new trial, however, this Court reinstated the judgment and verdict. *See United States v. Cerceda*, 172 F.3d 806 (11th Cir.1999)(en banc).

enacted ten year statute of limitations for financial institution offenses, and their prosecution for the bank frauds charged in counts 2, 3 and 6 violated the *ex post facto* clause; (2) that the indictment failed to state offenses and was constructively amended at trial; (3) that the jury instructions failed to charge that risk of loss is an essential element of the crimes of bank fraud and misapplication; (4) that Fernandez was incorrectly sentenced under the money laundering guidelines; (5) that the evidence was insufficient to support the convictions of Castilla; and (6) that the district court erred in denying appellants' motion for a new trial based on newly discovered evidence.

A. Ex Post Facto

We review *de novo* whether appellants' prosecution contravened the *ex post facto* clause of the U.S. Constitution. *United States v. Muench*, 153 F.3d 1298, 1300 (11th Cir.1998).

***1286** 1. Application of Section 3293

Effective August 9, 1989, Congress extended the statute of limitations for "financial institution offenses" (including 18 U.S.C. §§ 656, 1005, 1014 and 1344) from five to ten years. *See* 18 U.S.C. § 3293. Moreover, Congress expressly made the prolonged limitations period applicable to all such offenses which had been committed but as to which the former five year limitations period had not yet run. *See* Pub.L. No. 101-73, § 961(*l*) (3), 103 Stat. 501 (1989). Thus, offenses committed on or before August 9, 1984, would be barred by the five-year statute of limitations while offenses committed after August 9, 1984, would be governed by the new ten-year limitations period.

Appellants concede that the alleged offenses were subject to prosecution at the time § 3293 was enacted, however they assert that extending the limitations period violated the *ex post facto* clause because it deprived them of an affirmative defense which they could otherwise have

interposed. In other words, appellants maintain that all but three of the substantive financial institution offenses allegedly occurred on or before April 13, 1987, when the five-year limitations period was in effect, and would have been time-barred on the date of indictment, April 14, 1992. This argument misperceives the law.

The *ex post facto* clause prohibits the enactment of statutes which: (1) punish as a crime an act previously committed which was innocent when done: (2) make more burdensome the punishment for a crime, after its commission; or (3) deprive one charged with a crime of any defense available according to law at the time when the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 52, 110 S.Ct. 2715, 2724, 111 L.Ed.2d 30 (1990). Only statutes withdrawing defenses related to the essential elements of a crime, or to matters which a defendant might plead as justification or excuse fall into this latter category. *See id.* at 49-50, 110 S.Ct. at 2723.

Moreover, the law is well-settled that extending a limitation period before a given prosecution is barred does not violate the *ex post facto* clause. *See United States v. Grimes*, 142 F.3d 1342, 1345 (11th Cir.1998) (collecting cases). The universal vindication of § 3293 against *ex post facto* challenge is founded on an unbroken line of cases, consistently upholding such extensions, and stretching as far back as Learned Hand's opinion in *Falter v. United States*, 23 F.2d 420, 426 (2nd Cir.), *cert. denied*, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928) ("... while the chase is on, it does not shock us to have it extended beyond the time first set ..."). Thus, we follow our sister circuits in holding that § 3293 did not deprive appellants of a defense within the meaning of the *ex post facto* clause. *See United States v. Brechtel*, 997 F.2d 1108, 1113 n. 14 (5th Cir.1993) (collecting cases).[26]

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[26] Appellants would have us find that *Grimes* was wrongly

*1287 2. Prosecution for Bank Fraud

Appellants contend that counts 2, 3 and 6 infringe the *ex post facto* clause because they are premised on lease agreements validly executed prior to the enactment of the bank fraud statute, 18 U.S.C. § 1344, on October 12, 1984. Thus, they argue that any fraud that occurred in connection with the bank branch transactions was completed upon the execution and delivery of the lease agreements on November 3, 1983, August 21, 1984, and August 3, 1984, respectively. The government responds that bank fraud is a continuing offense such that the schemes charged in counts 2, 3 and 6 merely commenced with the signing of the leases and continued as long as the leases were in effect because they posed a continuing risk of injury to the bank.

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decided, and that 72 years of uniform jurisprudence has been overruled *sub silentio* by *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) and *Carmell v. Texas*, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000). In *Lynce*, the Supreme Court invalidated a Florida statute which cancelled early release credits awarded to prison inmates, resulting in the reincarceration of many offenders, because the law retroactively increased the severity of punishment. *See Lynce*, 519 U.S. at 446-447, 117 S.Ct. at 898. Moreover, the Court rejected the government's argument, propounded by appellants here, that the early release credits were awarded pursuant to a statute enacted after the date of offense; despite modifications in subsequent years, the basic statute was in effect at the time of petitioner's crime. *See id.* 519 U.S. at 447-48, 117 S.Ct. at 899. In *Carmell*, the Supreme Court held that a Texas statute permitting conviction in rape cases solely upon the testimony of the victim could not be retroactively applied because it reduced the quantum of evidence needed to convict. *See Carmell*, 529 U.S. at 552, 120 S.Ct. at 1643. These cases simply do not call into question the well-established principle that Congress may extend the limitations period before the original limitations period has expired.

Moreover, the government contends that a single bank fraud may be executed numerous times, and that each of the bank frauds charged in counts 2, 3 and 6 was "executed" after the statute was passed.

First, we must determine what constitutes the offense of bank fraud. Under 18 U.S.C. § 1344, a person is guilty of bank fraud if he "knowingly executes, or attempts to execute, a scheme or artifice ... to defraud a federally chartered or insured financial institution...." 18 U.S.C. § 1344 (1985). The unit of the offense created by § 1344 is each execution or attempted execution of the scheme to defraud, not each act in furtherance thereof. *See United States v. Molinaro*, 11 F.3d 853, 856-60 (9th Cir.1992); *accord United States v. Longfellow*, 43 F.3d 318, 323 (7th Cir.1995) (citing cases). Each component act of a scheme to defraud is not a separate violation because otherwise a single criminal transaction could result in an infinite number of prosecutable offenses having no particular relevance to the purpose of the bank fraud statute. *See Molinaro*, 11 F.3d at 860 (finding multiplicitous bank fraud counts charging separately each submission of documents to bank because they were not executions but acts in furtherance of real estate/loan fraud scheme). Accordingly, a bank fraud offense is complete upon the "execution," or attempted execution of the scheme. *See United States v. Lemons*, 941 F.2d 309, 318 (5th Cir.1991).[27]

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[27] *Lemons* involved a loan fraud scheme in which a bank officer caused his savings and loan institution to fund a large loan in excess of the purchase price and authorized an assignment fee from the loan funds, from which the defendant was to receive a portion for his personal benefit. *See Lemons*, 941 F.2d at 311-312. However, the defendant tried to conceal his participation by receiving the money in six separate payments over the course of several months. *See id.* at 313. The Fifth Circuit held that although the payments were in furtherance of the scheme to defraud, as concerned the savings and loan, there was but one

Yet, the government is correct that a single scheme can be executed a number of times, and a defendant may be charged in separate counts for each "execution" of the scheme to defraud. *See United States v. Sirang*, 70 F.3d 588, 595 (11th Cir.1995). In *Sirang*, the defendant was convicted on six counts of bank fraud for depositing bogus checks, i.e., checks written on accounts which he knew did not have sufficient funds. *See id.* We upheld the convictions against a challenge of multiplicity, ***1288**[28] reasoning that " 'two transactions may have a common purpose but constitute separate executions of a scheme where each involves a new and independent obligation to be truthful.' " *Id.* at 596 (*quoting Molinaro*,[29] 11 F.3d at 861 n. 16).

The question, then, is what constitutes an "execution" of the scheme. In *Sirang*, we distinguished check-kiting cases, in which each check increases the risk faced by the financial institution, from component acts in "a scheme to obtain a certain amount of funds or to obtain financing for a particular transaction[.]" *Id.* at 596 (*quoting United States v. Barnhart*, 979 F.2d 647, 650-51 (8th Cir.1992)). In other words, each part of the scheme that creates a separate financial risk for the financial institution constitutes a separate execution. *See, e.g., Longfellow*, 43 F.3d at 324. For example, *Longfellow* involved a scheme in which the

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execution of that scheme. *See id.* at 318.

[28] An indictment is multiplicitous if it charges the same offense in more than one count. *See Sirang*, 70 F.3d at 595.

[29] In *Molinaro*, the Ninth Circuit found each transfer of property to be a separate execution in a scheme where straw buyers purchased property to make a savings and loan look profitable and to conceal the real purchaser. *See Molinaro*, 11 F.3d 853. The court explained that the transactions were separate executions because they were chronologically and substantively independent, neither depended on the other for its existence, and each had its own functions and purpose. *Id.* at 860.

defendant granted a series of loans to members of a credit union to facilitate the sale of his own property, without disclosing his interest in the loans and without transferring title to the credit union as collateral for the loans. *See id.* at 319. Although the original loans were time-barred, Longfellow refinanced one of the loans within the limitations period. *See id.* The Seventh Circuit held that the renewal of the loan constituted a separate execution of the scheme because it created a new, independent risk for the credit union. *See id.* at 324.

Ultimately, the decision of whether a particular transaction is an "execution" of the scheme or merely a component of the scheme will depend on several factors including the ultimate goal of the scheme, the nature of the scheme, the benefits intended, the interdependence of the acts, and the number of parties involved. *Longfellow*, 43 F.3d at 323. For example, in *United States v. Duncan*, 42 F.3d 97 (2nd Cir.1994), certain directors of a savings and loan association ("the bank") conspired to purchase two properties with the intention of leasing and/or selling them back to the bank while concealing their interest therein from the other directors. *See id.* Raising an *ex post facto* challenge on appeal, Duncan asserted that the alleged bank fraud was completed when the bank insiders agreed to usurp the corporate opportunity, i.e., to purchase the properties. *See id.* at 104. The Second Circuit held that the scheme was not fully executed until the insiders sold the second property to the bank, in April 1985, because the central purpose of the scheme was not merely to seize the properties at a bargain, but also to sell the properties back to the bank at a premium. *See id.; cf. Lemons*, 941 F.2d at 315 (finding sufficient evidence to sustain conviction because loan scheme was not complete, or executed, until defendant received his benefit from the transaction).

Returning to the case at bar, the government contends that bank fraud is a continuing offense. A continuing

offense is one which is not complete upon the first act, but instead continues to be perpetrated over time. *United States v. Gilbert*, 136 F.3d 1451, 1453 (11th Cir.1998). Because the continuing offense ***1289** doctrine extends the statute of limitations, we are admonished to construe them narrowly. *See Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970). Thus, offenses should not be considered continuing unless "the explicit language of the ... statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing [offense]." *Id.*

The government asserts that the bank frauds continued until appellants were indicted in 1992 because appellants continued to collect lease payments from RNB and because the purchase options relating to the IPB and Westlands branches remained pending. In other words, the fraud continued as long as the leases did, because that was the means by which the appellants were enriched. Taken to its logical conclusion, the collection of rents on a lease obtained by fraud, for a term of 99 years, would toll the statute of limitations for 99 years. We think this goes too far. The law is clear that the bank fraud statute imposes punishment for each "execution" of the scheme to defraud, and not each act in furtherance. *See Longfellow*, 43 F.3d at 323 (citing cases); *see also United States v. Hare*, 618 F.2d 1085 (4th Cir.1980) (holding that indictment for allegedly receiving something of value pursuant to 18 U.S.C. § 201(g) when defendant accepted a loan was time-barred despite defendant's continued receipt of favorable interest and payment benefits during the term of the loan).

In this regard, the government misplaces reliance on *Duncan* and *Longfellow*. *Duncan*, as discussed above, involved a scheme strikingly similar to the one at bar, in which bank insiders induced the bank to finance the

purchase of certain property which they then leased, and ultimately sold to the bank. *See Duncan*, 42 F.3d 97. We acknowledge that the court characterized *conspiracy and bank fraud* as continuing offenses, however, the court cited exclusively to conspiracy cases as support for that proposition. *See id.* at 104 (emphasis added). Furthermore, because the defendants conceded that bank fraud was a continuing offense, the language is dicta. *See id.* Instead, the court held that "the scheme was not fully executed" until the defendants sold the second parcel of land to the bank, after the effective date of the bank fraud statute. *Id.* Thus, the conviction did not violate the *ex post facto* clause because the second sale constituted an "execution" of the scheme.

In *Longfellow*, the court loosely refers to the scheme as continuing in rejecting the defendant's argument that the scheme was barred by the statute of limitations.[30] *See Longfellow*, 43 F.3d at 325. The court goes on to explain that "[t]he fact that only one or two executions fell within the Statute of Limitations does not detract from the entire pattern of loans' being a scheme, and renders Longfellow no less culpable for the entire scheme." *Id.* The court ultimately holds that the renewal of a loan constituted a separate "execution" of the defendant's scheme, which brought the entire scheme within the limitations period. Thus, *Duncan* and *Longfellow* demonstrate ***1290** not that bank fraud is a continuing offense, but that a single bank fraud

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[30] The court stated that "the scheme continued until the Credit Union was taken out of Longfellow's hands in March 1986." *Longfellow*, 43 F.3d at 325. However, the court opined that the scheme was executed each time Longfellow arranged loans from the Credit Union, received loan proceeds as payment for the property, and failed to transfer title. *See id.*, 43 F.3d at 324. The government did not attempt to indict Longfellow for each execution, presumably because the earlier transactions occurred outside the limitations period. *Id.* at 325.

scheme can be executed multiple times.[31]

Next, we must consider whether counts 2, 3 and 6 properly charged post-1984 conduct that "executed" the bank fraud schemes.[32] As to count 2, we find that the sale of the Little Havana groundleases constituted a separate execution of the scheme to defraud RNB. Even though the purchase option derives from a lease predating the bank fraud statute, appellants had an obligation to disclose their ownership interest in the property at the time RNB exercised the option, in December 1986. The failure to do so in connection with the sale constituted a separate financial risk to the bank. *See, e.g., Longfellow,* 43 F.3d at 324. Appellants argue that the alleged bank fraud was

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[31] We distinguish *United States v. Paradies,* 98 F.3d 1266, 1284 (11th Cir.1996) in which this court upheld a conviction for mail fraud pursuant to 18 U.S.C. § 1346 because the defendant continued to use the mail to perpetrate his scheme after the effective date of the statute. *See id.* at 1273; *cf. United States v. Garfinkel,* 29 F.3d 1253, 1259- 60 (8th Cir.1994) (holding that mail fraud scheme continued past the effective date of § 1346, even though mailing occurred on same day § 1346 was signed into law).

[32] The indictment charged the following acts and dates of execution:

count 2	12-24-86 Sale of the Little Havana groundleases to RNB through Fernandez Land Trust for $1 million
count 3	10-19-90 Disbursement of accumulated rental payments received by Hialeah Properties from RNB under Westlands lease to De La Mata, Calas and Castilla
count 6	6-11-87 Receipt of $1 million loan from Ocean Bank collateralized by IPB property and conditional assignment of lease payments due Real Estate Partners from RNB
count 17	7-30-86 Sale of Orange Bowl to RNB, and contract to construct bank branch building.

"executed" when the lease was consummated because that agreement exposed RNB to all, if any risk of loss. However, the risk inherent in the purchase of the property was separate from the lease and was wholly speculative until RNB actually exercised the option. In this way, the lease and subsequent exercise of the purchase option are similar to the separate extensions of a loan agreement found to be separate executions of a scheme to defraud. *See United States v. Harris*, 805 F.Supp. 166, 174-175 (S.D.N.Y.1992) (reasoning that defendants were faced with a new obligation to be truthful each time they sought a loan extension).

We do not believe that counts 3 and 6 charged executions of the appellants' scheme to defraud RNB. Although the appellants continued to receive lease payments on the Westlands and IPB branches, the fraud was completed when appellants fraudulently obtained the leases with the intent at that time to collect future rent. *See United States v. Gregg*, 179 F.3d 1312 (11th Cir.1999) (holding that bank fraud was a completed crime when the defendant fraudulently obtained the deposit of the proceeds of a check with the intent to withdraw the money at a later time). The essence of bank fraud is the obtaining of money or property through fraud--in this case, the failure to disclose the insiders' involvement. In order to find that the disbursement of rent and of the Ocean Bank loan, collateralized by rent due from RNB, constituted executions separate from the underlying leases we would have to hold that appellants had a continuing duty to disclose, i.e., to tell the bank that they owned the property each time they accepted a rent check on the leases. As we discussed above, we do ***1291** not think the bank fraud statute dictates this result.[33]

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[33] At oral argument, counsel for the government offered the following hypothetical: Suppose an individual submits a false loan application to induce a bank to extend credit, but the individual has not received the funds yet. Government counsel

Our conclusion is further reinforced by the fact that two of the money laundering counts (counts 5 and 10) charge those transactions that allegedly executed the bank frauds set forth in counts 3 and 6, as transactions involving proceeds of "specified unlawful activity." For example, count 5 charged that appellants knowingly engaged in a transaction involving the proceeds of unlawful activity, i.e., bank fraud, with the intent to conceal the nature, source and ownership of such proceeds. The transaction involving illicit proceeds was identified as the disbursement of rent made by RNB under the Westlands lease to De La Mata, Calas and Castilla on October 19, 1990. The same disbursement of rent could not complete the offense of bank fraud and constitute the offense of money laundering. *See United States v. Christo, III,* 129 F.3d 578, 579 (11th Cir.1997). Accordingly, appellants' convictions on counts 3 and 6 violated the *ex post facto* clause.

Appellants maintain, without further explanation, that we must reverse their convictions for money laundering because those charges were "predicated upon the time-barred bank fraud[.]" First, we need only address counts 4 and 5 because they are the only money laundering charges predicated solely upon the bank fraud alleged in count 3, which we have reversed.[34] Second, we clarify our holding that 18 U.S.C. § 1344 could not be retroactively applied to prosecute appellants' scheme to defraud RNB in connection with the Westlands and IPB

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posited that the fraud was executed upon the making of false statements. This supports our conclusion that the bank branch schemes were executed upon the signing of the lease and loan agreements which materially misrepresented the bank insiders' financial interest.

[34] Counts 10-16 alleged transactions involving proceeds derived from the misapplication of bank funds, charged in counts 7-9, in addition to the bank fraud charged in count 6.

branches without infringing the *ex post facto* clause. This is because appellants did not have fair notice that they could be prosecuted for bank fraud when those leases were executed. *See Weaver v. Graham*, 450 U.S. at 28-30, 101 S.Ct. at 964-65 (stating that *ex post facto* prohibition protects against arbitrary changes in the law and assures that legislative Acts give fair warning of their effect). However, we are unaware of any legal bar to their prosecution for laundering the proceeds of what was clearly "specified unlawful activity" under 18 U.S.C. § 1956 of the Money Laundering Control Act of 1986.[35]

That statute makes it illegal to knowingly enter into a financial transaction ***1292** involving the proceeds of a "specified unlawful activity" with the intent to conceal or disguise the nature, location, source, ownership, or control of those proceeds. *United States v. Miller*, 22 F.3d 1075, 1079 (11th Cir.1994). "Specified unlawful activity" includes, *inter alia*, any racketeering offense listed in 18 U.S.C. § 1961(1). 18 U.S.C. § 1956(c)(7)(A). In turn, bank fraud is one of the offenses listed in § 1961(1). A convic-

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[35] The two provisions of 18 U.S.C. § 1956 under which appellants were charged provide: (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of illegal activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

* * *

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;....

18 U.S.C. § 1956.

tion for money laundering does not require proof that the defendant committed the specific predicate offense. *See United States v. Smith*, 46 F.3d 1223, 1234 (1st Cir.1995). It merely requires proof that the monetary transaction involved the proceeds of the predicate offense identified in the indictment. *See Miller*, 22 F.3d at 1079; *see also United States v. Mankarious*, 151 F.3d 694, 703 (7th Cir.1998). In this way, the First, Fifth, Seventh and Tenth Circuits have upheld money laundering convictions even though the defendant was not convicted of the underlying offense by which he obtained the money. *See United States v. Richard*, 234 F.3d 763, 770 (1st Cir.2000); *Mankarious*, 151 F.3d 694, 703 (dismissing mail fraud counts); *United States v. Tencer*, 107 F.3d 1120, 1130 (5th Cir.1997) (reversing convictions for mail fraud); *United States v. Kennedy*, 64 F.3d 1465, 1480 (10th Cir.1995) (affirming acquittal on mail fraud counts).

Similarly, although appellants could not be prosecuted for bank fraud *ex post facto*, it does not necessarily follow that they cannot be convicted for the laundering of proceeds obtained after the enactment of the bank fraud statute. We hold that these proceeds derived from "specified unlawful activity" i.e., bank fraud, because the Bank occupied the leased premises during a period after federal law prohibited schemes, like the one at bar, aimed at defrauding financial institutions. Appellants' prosecution for this conduct does not implicate the due process or *ex post facto* clauses because appellants were on clear notice that federal law prohibited their scheme yet they failed to take any remedial action. It is well settled that Congress may pass new laws which require us to alter our conduct or risk prosecution. *See Samuels v. McCurdy*, 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 568 (1925) (holding that Georgia prohibition statutes could be applied to a defendant who had lawfully acquired the liquor before the effective date of the statute, but continued the possession for several years after the change in the law); *Chicago & Alton R.R. Co.*

v. Tranbarger, 238 U.S. 67, 35 S.Ct. 678, 59 L.Ed. 1204 (1915) (affirming penalty against railroad for maintaining embankment in a manner prohibited by new law). Counts 4 and 5 charged that appellants obtained rent proceeds from Hialeah Properties' account in 1990, after enactment of the bank fraud statute and after Congress had declared bank fraud a "specified unlawful activity" under the money laundering statutes. Moreover, the jury found that appellants engaged in this transaction in order to conceal the source, nature or identity of these funds, and to further promote their scheme. Thus, appellants had a choice; they could have altered their conduct and renegotiated the leases with the Bank after giving full disclosure of their interests, or they could continue conduct that was now clearly illegal. Appellants chose to continue collecting and laundering the rent proceeds, and thus, we uphold appellants' convictions on counts 4 and 5.

Finally, appellants contend that the use of bank fraud as RICO predicates violated the *ex post facto* clause because bank fraud was not a predicate act until August 1989. *See* Pub.L. No. 101-73, § 968. Assuming, without deciding, that the predicate acts of bank fraud were based on pre-1989 conduct, ***1293** the jury found, by special verdict, that appellants' committed over 30 acts of racketeering. Only 6 of these were based on bank fraud. Thus, we sustain appellants' convictions on counts 58 and 59 for racketeering and racketeering conspiracy.

B. The Sufficiency of the Indictment and Proof at Trial

Appellants contend that the indictment should have been dismissed,[36] because every count therein (the bank

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[36] In the district court, appellants moved to dismiss the charges of making false entries for failure to state offenses. Appellants invite us to find that the district court erred in ruling that the accuracy of the alleged duties constituted a factual question. However, our review of the record reveals that the district court

fraud, misapplication, false statements, and hence, the RICO and money laundering counts) was based upon non-existent or mis-stated disclosure duties, and thus, the indictment failed to state offenses as a matter of law. We find it noteworthy that appellants moved pretrial to strike from the indictment and to exclude from evidence, as superfluous and prejudicial, any reference to civil banking laws and regulations requiring disclosure of insider transactions. [37] Now appellants assert that their convictions can only be sustained if they had the disclosure duties attributed to them by the federal banking statutes and regulations described in the indictment.

Appellants provide no support for the proposition that a scheme to defraud a financial institution must be predicated upon an affirmative duty to disclose. *See, e.g., United States v. Colton,* 231 F.3d 890 (4th Cir.2000) (finding that active concealment with intent to deceive constitutes actionable fraud under 18 U.S.C. § 1344). Assuming, *arguendo,* that an affirmative duty to disclose material information is essential to state a cause of action under the bank fraud statutes, we find such a duty based upon appellants' fiduciary relationship with RNB, the bank's own internal policies, and federal banking laws and regulations.

1. Fiduciary Duties

First, appellants were not customers dealing at arm's length with RNB, nor were they mere salaried employees of the bank. De La Mata, Calas and Castilla were director

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found that the challenged counts properly stated offenses. We agree.

[37] The district court denied the motion to strike and/or exclude evidence that civil regulations required disclosure of insider transactions on the grounds that such evidence was probative of the appellants' knowledge and intent.

and senior officers of RNB, and as such, owed a fiduciary duty to the bank and its depositors. *See F.D.I.C. v. Gonzalez*-Gorrondona, 833 F.Supp. 1545, 1549 (S.D.Fla.1993). The fiduciary duty, or duty of loyalty, obligates officers and directors to avoid fraud, bad faith, usurpation of corporate opportunities,[38] and self-dealing. *Id.*

Appellants assail the indictment's allegations of a duty to guide the bank to decisions "most favorable" to it, arguing that the banking regulations only require that insider transactions be conducted on the "same terms" as those applicable to others. However, we believe that the common law fiduciary duty is distinct and separate from appellants' duties under the banking regulations, which we take up below. Accordingly, we hold that appellants had a fiduciary duty to inform the Board of Directors ***1294** of their interests in the transactions they conducted with RNB, and to avoid participating in any bank transactions that affected them personally. *See United States v. Henderson*, 19 F.3d 917, 923 (5th Cir.1994) (stating that fiduciary duty required disclosure and abstention).

2. RNB's Internal Rules and Policies

RNB's own internal rules prohibited self-dealing without disclosure and abstention in order to protect the bank's depositors from financial mismanagement. *See United States v. Clark*, 765 F.2d 297, 303 (2nd Cir.1985) (finding that violation of internal bank rule or policy designed to protect bank's pecuniary interests evidenced scheme to defraud). The testimony of the bank's principal owner, its chairman, and every officer and employee who testified at trial established RNB's policy that its officers and directors disclose and abstain from self-interested

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[38] A corporate opportunity is a business opportunity in which the corporation has a valid and significant corporate purpose. *See Cohen v. Hattaway*, 595 So.2d 105 108 (Fla. 5th DCA 1992).

transactions. The testimony established that self-interested transactions included those involving officers' and directors' immediate family members. In furtherance of the policy of disclosure, each executive officer was required to complete an annual questionnaire disclosing all business interests in which s/he, or an immediate family member, maintained a direct or indirect interest. In fact, appellants' appreciation of these rules was proven at trial through incidents of disclosure and abstention made in their presence by other bank officials and in one instance, by De La Mata himself. Therefore, we reject the contention that the bank insiders were unacquainted with RNB's policy prohibiting self-dealing.

3. Federal Banking Laws and Regulations

In 1978, Congress amended the Federal Reserve Act in response to an alarming string of bank failures, in part due to insider abuses. *See United States v. McCright*, 821 F.2d 226, 231 at n. 3 (5th Cir.1987). In proposing the revised legislation, the bill's House sponsor articulated the motivation behind increased federal oversight: "It clearly emphasizes that bankers and savings and loan executives are operating with other people's money and that charters for financial institutions are not franchises to establish playpens for insiders." *Id.* (*quoting* H.R. Rep. No. 1383, 95th Cong., 2d Sess. 200, *reprinted in* 1978 U.S.C.C.A.N. 9273, 9331).

a. Extensions of Credit

Under 12 U.S.C. § 375(a), the Federal Reserve was authorized to prescribe rules concerning extensions of credit to bank insiders. *See* 12 U.S.C. § 375(a)(10). Pursuant to that mandate, 12 C.F.R. § 215.4, or "Regulation O" as it is better known, prohibits the extension of credit to a bank insider, or his related entities, when the total indebtedness of such party exceeds $500,000 unless: (i) the loan is approved in advance by a majority of the entire

board of directors; and (ii) the interested party abstains from participating directly or indirectly in the voting. The very first loan which appellants fraudulently obtained from RNB amounted to $700,000 (to finance the purchase of the Little Havana site), and their outstanding balance with RNB never fell below the threshold amount.

Regulation O set forth additional reporting requirements. Section 215.7 required the bank to maintain records of loans extended to executive officers and their related interests, and for this purpose, required executive officers to annually identify their "related interests." *See* 12 C.F.R. § 215.7. Section 215.9 required the bank to report all insider loans to federal regulators on an annual basis. *See* 12 C.F.R. § 215.9. In this way, the *1295 bank insiders' deception, particularly De La Mata's failure to disclose his business interests in RNB's annual questionnaire, caused RNB to violate numerous federal reporting regulations.

b. Purchases and sales of property

Under 12 U.S.C. § 375, purchases and sales of property between the bank and its directors are permitted: (1) when such transaction is made in the regular course of business upon terms not less favorable to the bank than those offered to others; or (2) when the transaction is authorized by a majority of the board of directors not interested therein. *See* 12 U.S.C. § 375. Moreover, the statute provided authority for the reporting of such conflicted transactions to federal banking regulators. *See id.* The evidence at trial showed that the term "in the regular course of business" is commonly understood to mean through a public market. Appellants do not contend that the purchases of OREO property or the lease/sale of branch sites to RNB were conducted on an open market. Rather, they assert that disclosure was not required because these purchases and sales were conducted on fair and reasonable terms. This argument misses the point.

The appropriateness of these transactions was not for the bank insiders to unilaterally determine. The statute dictates that that determination could only be made by disinterested directors. We also find the duty to disclose plain on the face of the statute, and thus, reject appellants' contention that there was no violation unless and until the FRB promulgated appropriate disclosure forms and regulations. Thus, the indictment correctly alleged that appellants were obligated to gain the approval of a disinterested majority of RNB directors prior to engaging in these transactions.

c. Bank Branch Transactions

In order to open new branches, national banks must obtain the prior approval of the OCC, which is granted plenary power over such requests. *See* 12 U.S.C. § 36(e). During the time period in issue, the OCC required banks to state whether the new branch property was to be leased or purchased from an officer or director,[39] and reserved the right to deny such applications if the terms of the site were more favorable to the insiders than would be available in a comparable transaction with unrelated parties. *See* 12 C.F.R. § 5.30(c)(2)(iii). Once again, appellants do not contest the disclosure requirements, but contend that the commercial reasonableness of the bank branch transactions precluded the OCC from denying them. We reject appellants' argument for the reasons set forth above. Accordingly, we conclude that the indictment sufficiently

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[39] If the new branch property was leased or purchased from a bank insider, the OCC required the bank to provide an independent appraisal or survey of comparable purchases/leases in the market area and to attach a resolution of the Board of Directors approving the transaction with the officer or director abstaining from the vote. *See* Comptroller of the Currency, *Comptroller's Manual for Corporate Activities*, Vol. 2, Jan. 1992, at 47-54.

and accurately alleged appellants' duty to disclose and abstain from self-interested transactions, and thus, stated offenses as a matter of law.

De La Mata makes the related argument that he could not be charged with making false entries in annual OCC disclosure forms, RNB questionnaires, and representation letters to RNB's outside auditors because there was no statutory or regulatory duty to disclose the information sought therein.[40] Appellant, however, misconstrues the law.

*1296 The prohibition of false entries is in broad and comprehensive terms.[41] Mr. Justice Cardozo, in describing

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[40] Counts 44-47 charged De La Mata with failing to disclose to the OCC (1) every business interest he, his spouse, or child had an interest in during the preceding year; and (2) every reportable transaction he, his spouse, child, or any of their related business interests had with the bank in the preceding year. Counts 50-53 alleged that De La Mata falsely stated in annual letters to RNB's outside auditors that all "related party transactions" had been disclosed. Counts 54-57 charged De La Mata with falsely representing, in RNB's annual questionnaire of executive officers and directors, that he did not own, directly or indirectly, more than 25% of any business, and that his loans obtained, directly or indirectly, from RNB did not exceed $100,000.

[41] At the time of De La Mata's acts, 18 U.S.C. § 1005 read in pertinent part:

Whoever makes any false entry in any book, report, or statement of such bank ... with intent to injure or defraud such bank or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System--

Shall be fined not more than $5,000 or imprisoned not more than

12 U.S.C. § 592, a forerunner of the modern bank fraud statutes, defined false entries to include "any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent to deceive it's officers or to defraud the association." *United States v. Darby*, 289 U.S. 224, 226, 53 S.Ct. 573, 574, 77 L.Ed. 1137 (1933) (quotation omitted). The purpose of the statute is to help insure that inspection of a bank's books will yield a true picture of the bank's condition. *See United States v. Manderson*, 511 F.2d 179, 180-81 (5th Cir.1975). As such, an omission of material information as well as an actual misstatement qualifies as a false entry under the statute. *See United States v. Jackson*, 621 F.2d 216, 219 (5th Cir.1980).

The forms at issue here are annual disclosure forms to the OCC, annual representation letters to RNB's outside auditors, and RNB's annual questionnaire of executive officers and directors. Irrespective of whether these specific forms or the information requested therein was authorized or required by law, the reports were made in the regular course of the business of the Bank and pertained to the Bank's financial position. Accordingly, we conclude that the indictment stated offenses of making false entries. *See e.g., United States v. McCright*, 821 F.2d 226 (5th Cir.1987) (holding that bank officer's failure to disclose information in bank questionnaire constituted false entry in violation of 18 U.S.C. § 1005).

4. Constructive amendment
and the doctrine of corporate opportunity

Appellants make two final arguments related to the indictment. First, they contend that the government constructively amended[42] the indictment by abandoning

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five years, or both.

18 U.S.C. § 1005 (1988).

[42] Under the law in this circuit, "an amendment occurs when the

the theory presented to the grand jury, i.e., that appellants' crimes were based on violations of federal banking laws and regulations, and proving instead that the fraud was based upon the breach of the common law doctrine of "corporate opportunity." However, we have already established that the indictment asserted three sources of duty, including appellants' fiduciary *1297 duties. Since the appropriation of a corporate opportunity constitutes breach of a fiduciary's duties, *see Cohen v. Hattaway*, 595 So.2d 105, 108-9 (Fla. 5th DCA 1992), we find no merit in this argument.

Finally, appellants assert that the government's amended theory of prosecution was flawed because the Florida Legislature abrogated the common law doctrine of corporate opportunity. We disagree.

It is a cardinal principle that an officer or director of a corporation will not be permitted to make out of his official position an undisclosed profit adverse to the corporation's interests and because of their fiduciary character will not be permitted to acquire for their own advantage interests adverse or antagonistic to the corporation. *See Independent Optical Co. v. Elmore*, 289 So.2d 24, 25 (Fla. 2nd DCA 1974). Indeed, Florida law continues to recognize official liability for misappropriation of a corporate opportunity. *See Florida Discount Properties v. Windermere Condo., Inc.*, 786 So.2d 1271, 1272 (Fla. 4th DCA 2001); *see also Cohen v. Hattaway*, 595 So.2d at 108. Thus, we read F.S. § 607.0831[43] as codifying the "business judgment rule" in

(... Continued)

essential elements of the offense contained in the indictment are altered to broaden the possible bases of conviction beyond what is contained in the indictment." *United States v. Keller*, 916 F.2d 628, 634 (11th Cir.1990).

[43] That statute, entitled "Liability of directors" reads, in pertinent part: (3) A director is deemed not to have derived an improper personal benefit from any transaction if the transaction ... [is] not prohibited by state or federal law or regulation and,

Florida. *Accord In re Toy King Distr. Inc.*, 256 B.R. 1, 173 (M.D.Fla.2000).

The business judgment rule protects disinterested directors. Disinterested directors neither appear on both sides of a transaction nor expect to derive any personal benefit from it in the sense of self-dealing–as opposed to a benefit which devolves upon the corporation or all stockholders generally. *Id.* (*quotation omitted*); *see also Aronson v. Lewis*, 473 A.2d 805, 812 (Del.1984). In this way, F.S. § 607.0831(3)(c) establishes that it is not inappropriate, per se, for a director to derive personal benefit from a transaction which benefits the corporation generally. However, § 607.0831 did not abrogate the prohibition against theft of corporate opportunities or any other form of self-dealing. *Cf. Perlow v. Goldberg*, 700 So.2d 148, 150 (Fla. 3rd DCA 1997) (stating that F.S. § 607.0831 does not shield officers and directors charged with criminal activity, fraud or self-dealing). The evidence at trial established that in 1983, RNB's Board of Directors, including De La Mata, identified a need to open additional bank branches. Armed with this knowledge, De La Mata, Calas and Castilla acquired properties, with RNB's own financing, and then induced the Bank to lease back these properties at rates well above those available on the open market. Accordingly, we find no error with the introduction of evidence at trial that appellants usurped corporate opportunities in furtherance of their plan to defraud RNB.

C. Jury Instructions

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...

(c) The transaction was fair and reasonable to the corporation at the time it was authorized by the board, a committee, or the shareholders, notwithstanding that a director received a personal benefit.

F.S. § 607.0831.

Appellants next contend that risk of loss is an essential element of bank fraud and misapplication, and the district court's failure to instruct the jury on this alleged element mandates reversal of their convictions for violation of both §§ 1344 and 656. We review the district court's refusal to give appellants' proposed instructions for abuse of discretion. *See United States v. Cunningham*, 194 F.3d *1298 1186, 1199 (11th Cir.1999). The district court's refusal to give the requested instruction is reversible error only if (1) the instruction is substantially correct, (2) the instruction was not addressed in the charge actually given, and (3) the failure to give the requested instruction seriously impaired the defendant's ability to present an effective defense. *See id.* at 1200.

1. Bank fraud

Although incapable of precise definition, the term "scheme to defraud" includes "any pattern or cause of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived." *United States v. Goldblatt*, 813 F.2d 619, 624 (3rd Cir.1987). To prove bank fraud under 18 U.S.C. § 1344, the government must show that the defendant (1) engaged in a scheme or artifice to defraud, or made materially false statements or representations to obtain moneys, funds or credit from; (2) a federally insured financial institution; and (3) that the defendant acted knowingly. *United States v. Goldsmith*, 109 F.3d 714, 715 (11th Cir.1997); *see also United States v. Brandon*, 17 F.3d 409, 424 (1st Cir.1994). The question here is whether the government must also prove that appellants exposed the Bank to a risk of loss as part of the scheme to defraud.[44]

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[44] On November 18, 1988, Congress enacted 18 U.S.C. § 1346 stating that for purposes of Title 18, "the term 'scheme or artifice to defraud' includes a scheme to deprive another of the

This is an issue of first impression in this Circuit. The Ninth Circuit has observed that the "Courts of Appeals that have adopted a 'risk of loss' analysis have not made clear whether its proof is necessary or merely sufficient to show intent." *United States v. Wolfswinkel*, 44 F.3d 782, 785-786 (9th Cir.1995). The First Circuit, sitting *en banc*, has held that "intent to harm" is not an element of bank fraud. *See United States v. Kenrick*, 221 F.3d 19, 26-29 (1st Cir.2000) (en banc) (holding that intent element of bank fraud is an intent to deceive the bank in order to obtain something of value, irrespective of an intent to harm the bank). Our review of the cases reveals that courts apply the risk of loss analysis in determining whether a scheme primarily directed at a non-bank third party can still give rise to bank fraud. *See Brandon*, 17 F.3d at 426 (citing cases); *see also United States v. Jacobs*, 117 F.3d 82, 92-92 (2nd Cir.1997) (upholding bank fraud conviction where defendant marketed fraudulent certified drafts for purchase by debtors because he intended, even instructed, debtors to submit drafts to banks for release of indebtedness). Therefore, we believe that "risk of loss" is merely one way of establishing intent to defraud in bank fraud cases. *Accord United States v. Hoglund*, 178 F.3d 410, 413 (6th Cir.1999).

In this case, we need not decide whether exposing RNB to a risk of loss was necessary to show appellant's intent. If it is necessary, the government offered sufficient evidence at trial to prove that the appellants' scheme exposed the Bank to potential and actual harm. First, the evidence at trial established that appellants embezzled millions of dollars from RNB. Second, appellants' scheme exposed RNB to potential governmental sanction for the

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(... Continued)

intangible right to honest services." 18 U.S.C. § 1346. Section 1346 does not apply here because the alleged bank fraud took place before its effective date.

circumvention of regulatory requirements. *Accord United States v. Parekh*, 926 F.2d 402, 408 (5th Cir.1991). Third, appellants' usurpation of RNB's corporate opportunities caused the Bank economic loss.

***1299** Appellants contend that the scheme did not subject RNB to a risk of loss that it did not knowingly assume because all the financial terms were disclosed and approved by the Board. In addition, appellants assert that the loans were made at ordinary rates of interest, that the loans were secured either with a mortgage or with RNB's lease payments, and that RNB knew how much profit was involved in these transactions (because RNB knew the purchase prices). The only fact that RNB did not know was that its own officers shared in the profits. This, however, is a clever way of saying that RNB did not know how good a deal it could have gotten. De La Mata, Calas and Castilla had a clear duty, under the federal banking regulations, to disclose self-interest in transactions vis-a-vis the bank. They also had a fiduciary duty to abstain from profiting out of their official positions and from acquiring for their own advantage interests adverse to the bank. In other words, appellants' scheme deprived RNB of the right to conduct these transactions on the same terms as its own faithless officers. Common sense dictates that RNB suffered a loss, albeit maybe not a bottom line deficit. Accordingly, we hold that the failure to give a "risk of loss" instruction did not seriously impair appellants' ability to present their defense.[45]

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[45] Appellants cite *United States v. deVegter*, 198 F.3d 1324 (11th Cir.2000) for the proposition that risk of economic loss is an essential element of bank fraud, and thus, the district court committed reversible error in failing to instruct the jury accordingly. However, deVegter held that the indictment alleged facts sufficient to state an offense pursuant to § 1346. We have already found that the indictment was sufficient, and now conclude that the jury was correctly charged on the

We view appellants' argument concerning risk of loss synonymous with a challenge to the district court's instruction on intent, and thus do not address the intent instruction separately.[46]

2. Misapplication

To establish the offense of misapplication of bank funds pursuant to 18 U.S.C. § 656 the government must prove: (1) that the accused was an officer, director, agent or employee of a bank; (2) that the bank was in some way connected with a national or federally insured bank; (3) that the accused willfully misapplied the monies or funds of the bank; and (4) that the accused acted with intent to injure or defraud the bank. *United States v. Morales,* 978 F.2d 650, 652 (11th Cir.1992). The "intent to injure or defraud the bank" element is established by proof that the defendant knowingly participated in a deceptive or fraudulent transaction. *United States v. Blanco,* 920 F.2d 844, 845 (11th Cir.1991).

Appellants contend that they could not be convicted of misapplication absent a jury finding that the extensions of credit charged in counts 7-9, 18- 20 and 28 exposed RNB to a risk of loss. *See United States v. Clark,* 765 F.2d at 302-03. However, the court in *Clark* explained that conviction for misapplication of bank funds requires that the bank officers' conduct involve more than the violation of a rule or policy not designed to protect the bank against monetary risk. *See id.* (distinguishing bank loan limits from rule prohibiting, solely for political reasons, loans to

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(... Continued)

elements of bank fraud, including the intent to wrongfully obtain money or other property from the Bank.

[46] The district court charged that intent to defraud means "to act knowingly and with specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another, or bringing about some financial gain to one's self."

companies doing business with the apartheid government of South Africa). The Second Circuit concluded that the failure to charge on risk of loss was not erroneous because the rule in question was designed to protect the bank against monetary risk, and thus, equated to a finding that the defendant intentionally circumvented risk-related restrictions in order to obtain money for themselves. *See id.*

In this case, the record is clear that, in addition to the violation of federal regulations, appellants violated internal bank rules aimed at protecting RNB's assets; they intentionally provided false information to acquire loans. Moreover, they induced RNB to extend the loans, and thus, took financial advantage of a confidential relationship. *Accord. United States v. Bates,* 852 F.2d 212, 215-216 (7th Cir.1988). We find no abuse of discretion in the district court's refusal to give the requested instruction.

Finally, Castilla argues that the district court improperly denied his proposed instruction on good faith and advice of counsel, while at the same time giving such an instruction on behalf of Fernandez. The failure to give a proposed charge constitutes reversible error only if it has adequate legal and factual underpinnings. *United States v. Terebecki,* 692 F.2d 1345, 1351 (11th Cir.1982). After reviewing the record and all relevant testimony, we agree with the district court that the proposed charge lacked evidentiary support. Castilla's defense at trial was not that he had proceeded on the good faith belief that his conduct was lawful, but rather that he did not intend to harm the bank. Castilla elected not to testify at trial, and the evidence relied on to exonerate him simply does not support the notion that Castilla acted in good faith. The evidence also refutes Castilla's asserted reliance on advice of counsel. Shockett was falsely told that the requisite disclosures had been made, Silva testified that he was cognizant of his need to conceal from RNB the participa-

tion of the bank insiders, and Perez was never informed as to the identities of the purchasers. Finally, we note that defense counsel fully aired Castilla's good faith defense in closing arguments, and the district court reinforced the theory by informing the jury that Castilla contended that he did not intend to injure the Bank. In view of the underlying evidence and the district court's specific intent instructions, we find no abuse of discretion.[47]

D. Evidentiary Rulings

Fernandez contends that the district court's rulings sustaining hearsay objections deprived him of the fundamental right to testify in his own defense. Fernandez claims that he attempted to recount conversations he had with various bank officials in order to show that the bank knew about his co-defendants' interest. He maintains that the statements were not offered for their truth, but for the effect on his state of mind and thus were relevant to show that he lacked the requisite criminal intent.

The district court has broad discretion in ascertaining admissibility of hearsay evidence, which we will not disturb absent abuse of discretion. *United* ***1301** *States v. NationsBank of Fla. N.A.*, 53 F.3d 1548, 1554 (11th Cir.1995). Moreover, the harmless error standard applies to erroneous evidentiary rulings. *See Aetna Cas. & Surety Co. v. Gosdin*, 803 F.2d 1153, 1159 n. 12 (11th Cir.1986). After reviewing the record, we find that the exclusion of this

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[47] We also find that the appellants' requested jury instruction regarding the statute of limitations applicable to the fraud and misapplication charges (18 U.S.C. §§ 656 and 1344) was correctly rejected by the district court as lacking the necessary evidentiary foundation. Aside from counts 3 and 6, *see infra*, there was no conflicting evidence presented at trial that the challenged offenses were committed prior to August 9, 1984. We find no merit, and thus, do not address appellants' remaining arguments with respect to the jury instructions.

testimony did not substantially affect Fernandez's ability to present his good faith defense. *See* Fed.R.Crim.P. 52(a). The defense could have cross-examined or recalled bank officials to testify concerning their dealings with Fernandez, if indeed these statements could have been helpful to Fernandez's defense. Moreover, the evidence overwhelmingly established that Fernandez intentionally concealed the identities of his partners. During the course of the scheme, Fernandez made more than twenty statements, in the form of loan applications or financial statements, to RNB that fraudulently concealed the bank insiders' interest in the proposed transactions. Accordingly, we conclude that the exclusion of this testimony was harmless error, if error at all.

E. Sufficiency of the evidence

Castilla contends that the evidence does not support any of his 37 counts of conviction. We review the sufficiency of the evidence *de novo,* viewing the evidence and all reasonable inferences and credibility choices made in the government's favor. *See United States v. Calderon,* 127 F.3d 1314, 1324 (11th Cir.1997). We will reverse a conviction only if we find that a reasonable fact-finder could not find proof of guilt beyond a reasonable doubt. *See United States v. Adkinson,* 158 F.3d 1147, 1150 (11th Cir.1998).

Essentially, Castilla assails the government's proof of his intent to defraud RNB. He asserts that the evidence failed to establish that he knowingly and voluntarily agreed to defraud the Bank, or that he committed any acts designed to facilitate the alleged scheme. The evidence refutes this contention.

First, Castilla held a 25% stake, the equivalent of Calas', in the various front companies appellants formed to conceal the bank insiders' interest. This included Hialeah Properties, the Fernandez Land Trust, Real Estate Partners, Great Group and CSEC. Second, Castilla's interest in these

entities was not an act of charity, as he would have us find, but compensation for his active role in promoting the affairs of the enterprise. As a member of RNB's Loan Committee, Castilla voted to extend loans to these entities, while concealing the insiders' conflict of interest, on at least nine occasions. Castilla arranged for CSEC, an entity nominally owned by Castilla's family and Shockett, to receive an unsecured loan for the purchase of OREO property from RNB. Castilla, along with Calas, received a substantial portion of the profit on the resale. Moreover, the jury could have concluded that Castilla recruited Fernandez as the insiders' front man since Fernandez had been Castilla's banking customer and friend for many years. In fact, Castilla provided Fernandez with the initial deposit for the Little Havana site. Castilla also provided part of the down payment on the IPB branch. The evidence showed that Calas and Castilla retained Shockett to represent them in the IPB transaction because Castilla's niece was Shockett's secretary. Castilla falsely told Shockett that he had disclosed his conflict of interest to RNB, further evincing Castilla's criminal intent. Finally, illicit proceeds from the various transactions were continuously deposited into a joint account that Castilla maintained with Calas, yet Castilla never questioned or repudiated his share of the profits. Although Castilla contends that he did not know the source or the fact of such deposits, the *1302 evidence showed that an account at a small savings and loan was opened for the sole purpose of concealing his share of the profits.[48] Thus, we

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[48] The evidence showed that a joint account in the name of Calas and Castilla was opened at Metropolitan Bank on October 10, 1984, with an initial deposit of $55,125. That same day, the proceeds from the sale of the Little Havana parking lot were disbursed from Fernandez' account in the form of two checks drawn in the amount of $55,125 each. The second check was deposited into De La Mata's account at the Metropolitan, an

find sufficient evidence that Castilla actively participated in virtually every aspect of the scheme with the intent to defraud RNB.

F. Sentencing

Fernandez asserts that the district court should have computed his offense level under the more lenient fraud guidelines because the money laundering was a minor, incidental part of the appellants' scheme, and thus, outside the "heartland" of the money laundering guideline. We review the district court's application of the Sentencing Guidelines under a *de novo* standard, but review its findings of fact only for clear error. *See United States v. Harness*, 180 F.3d 1232, 1234 (11th Cir.1999).

Appellants were convicted of bank fraud, money laundering, false statements, false entries and misapplication of bank funds. The district court assigned all counts of conviction to a single group pursuant to U.S.S.G. § 3D1.2(d) (requiring grouping when the offense level is determined on the basis of the total amount of harm or loss, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior). The grouping is not challenged on appeal. Having grouped the offenses, the district court applied the guideline that produced the highest offense level as instructed by U.S.S.G. § 3D1.3(b). With respect to Fernandez, the bank fraud counts carried an offense level of 24, U.S.S.G. § 2F1.1(a), while the money laundering counts carried a level of 28, U.S.S.G. § 2S1.1(a)(1). Thus, the district judge sentenced Fernandez to 97 months, at the lowest end of the laundering guideline range of 97-121 months.

Fernandez relies on *United States v. Smith*, 186 F.3d 290 (3rd Cir.1999), in which the Third Circuit opined that a

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account that was also opened on October 10, 1984, with that initial deposit.

sentencing court should consider whether the designated guideline applies or whether the conduct is "atypical" in comparison to that usually punished by the statute of conviction, and if so decides which guideline is more appropriate. *Id.* at 297; *but see* U.S.S.G., Supplement to App. C, Am. 591, at 32 (2000) (removing the "atypical" language from the Guideline and explaining that it had been improperly used by courts to decline to use the offense guideline in cases that were allegedly "outside the heartland"). However, we have rejected this approach. In *United States v. Adams*, 74 F.3d 1093 (11th Cir.1996), the district court applied the fraud rather than money laundering guidelines reasoning that the gravamen of the defendants' unlawful scheme was fraud and that the subsequent deposit of illicit proceeds was merely incidental. *See id.* at 1101. This Court reversed and held that the money laundering convictions had to be considered in determining the defendants' base offense levels because, otherwise, the jury's guilty verdict on the money laundering would be nullified. *See id.*

In any event, we conclude that the money laundering at bar was integral to appellants' scheme. *See Smith*, 186 F.3d at 298 (*quoting* Sentencing Commission Report to Congress that the "heartland" of money ***1303** laundering includes separate monetary transactions designed to conceal past criminal conduct or to promote further criminal conduct). Pursuant to a special verdict, the jury specifically found that appellants engaged in money laundering in order to conceal the origins of the illicit proceeds and to continue the bank fraud scheme. Thus, we find no error in sentencing Fernandez under the money laundering guideline for this conduct.

Fernandez also claims that the district court erred in denying his request for a downward departure because this was an extraordinary case involving deals favorable to the bank and approved by bank officials. We review the

district court's discretionary refusal to depart downward only if the district court erroneously believed it did not have the statutory authority to do so. *See United States v. Sanchez-Valencia,* 148 F.3d 1273, 1274 (11th Cir.1998). Fernandez contends that the district court wholly failed to address the grounds for his request, and thus, was ambiguous as to whether the court had authority to depart from the guideline. However, our review of the record reveals that Fernandez requested a downward departure on the basis that he was not a bank officer, and thus, was less culpable than his co-defendants. Accordingly, the district court rejected the request stating that the money laundering guidelines did not overstate Fernandez's role in the scheme, which required the concerted effort of each of the appellants. We will not disturb the district court's discretionary refusal to depart downward.

Finally, Fernandez contends that the district court erred in enhancing his sentence for obstruction of justice, and in denying him the opportunity to be heard prior to its ruling. Fernandez concedes that the government's response to Fernandez's Pre-Sentence Report put him on notice that the government was seeking application of the obstruction enhancement over five weeks before the sentencing hearing commenced. However, he argues that he was not given an adequate opportunity to respond because the government did not identify specific instances of perjured testimony.

After reviewing the record and sentencing hearing transcripts, we find no merit in this position. First, Fernandez failed to file any response or objection to the government's initial request for enhancement. At the sentencing hearing, on April 21, 1993, the government supplemented its earlier written submission by enumerating specific examples of Fernandez's perjury. The following day, the government filed with the court, and served on defense counsel, an additional written memorandum further

refining the government's position. Defense counsel again elected not to file any response.

When the sentencing hearing was renewed on April 23, 1993, the court concluded that Fernandez had perjured himself on at least four occasions when he testified that bank officials approached him and persuaded him to use the various properties as branch sites instead of developing shopping centers as he had planned. The district court found that this testimony was not credible and moreover, was specifically contradicted by the testimony of Dr. Botifoll and Mr. Isaias, who both stated that Fernadez solicited them. We give due deference to the district court's opportunity to determine credibility, *see* 18 U.S.C. § 3742(e), and thus, cannot conclude that the enhancement for obstruction of justice was clearly erroneous. *See United States v. Simmons*, 924 F.2d 187, 191 (11th Cir.1991).

G. Motion for New Trial

Alas, appellants' attack with respect to every aspect of their prosecution would not *1304 be complete without an argument that newly discovered evidence mandates a new trial. They contend that the district court erred in summarily denying their motion for new trial and/or vacatur of the restitution order[49] in light of the terms of the "Settlement Agreement" entered into between the government and RNB in January, 1994. That understanding, among other things, resolved RNB's corporate liability in connection with a pending investigation of narcotics money laundering activities that occurred at the Bank during the

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[49] On April 23, 1993, the district court entered an Order of Restitution, pursuant to 18 U.S.C. § 3663, in favor of RNB against appellants in the amount of $1,786,194. That sum represented illicit profits earned on the OREO purchases and on the sale of the Little Havana and Orange Bowl branches, and rent paid in excess of the fair market rental value on the Westlands and IPB leases as of October 1992.

insiders' tenure. The Settlement Agreement also provided that RNB would purchase the IPB and Westlands sites at the conclusion of the respective leases, at a price to be determined by an independent appraiser, subject to a credit for excessive rents, which rent the government would continue to collect, per the forfeiture order. The IPB lease expired, and appellants allege that the government's resulting failure to remit the excessive rents, in addition to the sale of the property to a third party for $1.4 million, far greater than that established at trial, constitute new evidence that the bank branch leases were fair. Moreover, appellants' assert that the post-trial execution of the Settlement Agreement reveals RNB's previously undisclosed motive to curry favor with the government, by suppressing the true value of the bank branch sites.

After reviewing the parties' briefs, the Settlement Agreement, and all other relevant parts of the record, we find no abuse of discretion. First, the IPB transaction constituted one part of the appellants' intricate fraud, and only one of several components of the district court's restitution calculation. Second, the rental overcharges incorporated into the restitution order and those dealt with in the Settlement Agreement are separate and distinct. The restitution order required appellants to restore to RNB only the excessive rent payments which the Bank actually made during the 1984-1992 period. The Settlement Agreement, on the other hand, deals with the rent paid after January 1, 1994. Thus, the Settlement Agreement did not affect the amount of restitution.

Moreover, assuming that risk of economic loss is an element of bank fraud, the increased value of the IPB site does not constitute new evidence entitling appellants to a new trial on all charges, or even the invalidation of the restitution order. The only valuation which was relevant at trial was the property's objective fair market value in 1984. This figure is based on publicly reported sales of

comparable property at the same time, and is not discredited by a price commanded in 2000. Moreover, even if we were to find, which we do not, that an increase in market value would constitute evidence that the rents were not excessive, the appreciation would also increase the value of the opportunity usurped by the bank insiders. In other words, although the rental payments might be viewed as less exorbitant, the illicit profit anticipated by appellants on the resale would be substantially increased. Accordingly, we find no abuse of discretion in the district court's judgment that this evidence did not entitle appellants' to a new trial and/or vacatur of the restitution order.

IV. Conclusion

For the reasons set forth above, we reverse appellants' convictions on counts 3 *1305 and 6, and sustain their convictions on all other counts. Because of the grouping prescribed by the sentencing guidelines, we find that the reversal of counts 3 and 6 does not alter in any way the sentences imposed.

REVERSED in part and AFFIRMED in part

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11756-E

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 21, 2004
THOMAS K. KAHN
CLERK

OSCAR CASTILLA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

Before BIRCH and HULL, Circuit Judges.

BY THE COURT:

Appellant, through counsel, has filed a motion for reconsideration of this Court's order dated June 15, 2004, denying appellant a certificate of appealability. Upon reconsideration, appellant's counseled motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Fed.R.Crim.P. 44(c)(2); United States v. Garcia, 517 F.2d 272, 277-78 (5th Cir. 1975); see also Duncan v. Alabama, 881 F.2d 1013, 1017 (11th Cir. 1989).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11458-E

MANUEL CALAS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
JUL 21, 2004
THOMAS K. KAHN
CLERK

Appeal from the United States District Court for the
Southern District of Florida

Before BIRCH and HULL, Circuit Judges.
BY THE COURT:

Appellant, through counsel, has filed a motion for reconsideration of this Court's order dated June 15, 2004, denying appellant a certificate of appealability. Upon reconsideration, appellant's counseled motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Fed.R.Crim.P. 44(c)(2); United States v. Garcia, 517 F.2d 272, 277-78 (5th Cir. 1975); see also Duncan v. Alabama, 881 F.2d 1013, 1017 (11th Cir. 1989).